(16,205.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 139.

EDWIN H. McHENRY AND FRANK G. BIGELOW, AS RECEIVERS OF THE PROPERTY OF THE NORTHERN PACIFIC RAILROAD COMPANY, APPELLANTS,

vs.

LORE ALFORD, J. C. GATES, A. D. STEPHENS, SUMNER R. CLARKE, AND D. C. LAKE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 19, 1897.

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1895.

WIN H. McHENRY and FRANK G. Bigelow, as Receivers of the Property of the Northern Pacific Railroad Company, Appellants, *vs.* RE ALFORD, J. C. GATES, A. D. Stephens, Sumner R. Clarke, and D. C. Lake, Appellees.	No. 748. Appeal from the Circuit Court of the United States for the District of North Dakota.

The United States circuit court of appeals for the eighth circuit, ting at the city of St. Louis, Missouri, on this 17th day of February, D. 1896, hereby certifies that upon the record on file in said court the above-entitled case, wherein Edwin H. McHenry and Frank Bigelow are appellants and Lore Alford, J. C. Gates, A. D. ephens, Sumner R. Clarke, and D. C. Lake are appellees, which se is now pending before this court upon an appeal duly taken om a decree rendered by the United States circuit court for the strict of North Dakota, dismissing the complainants' bill of com- aint, the following facts appear, to wit:

That on March 22, 1894, Thomas F. Oakes, Henry C. Payne, and enry C. Rouse, as receivers of the Northern Pacific Railroad Com- ny (in whose place and stead since the final hearing of the case dwin H. McHenry and Frank G. Bigelow have been substituted complainants), filed a bill of complaint against J. A. Rickert, unty treasurer of Richland county, North Dakota; Charles J. de, county auditor of Richland county, North Dakota; The ounty of Richland, North Dakota; D. C. Lake, S. H. Snyder, A. D. ephens, Sumner R. Clarke, S. B. Zeigler, Wm. Butt, C. A. Dole, ndrew Walker, D. E. Lake, R. A. Darling, W. A. White, L. R. reeman, N. Arntson, H. C. Sutherland, E. J. Dickey, Security rust Company, a corporation; Ingvald Reine, Wm. Britt, E. B. nes, H. D. Stephens, Henry Jones, A. Ankefeldt, —— Blaiden, hose first name is unknown; Lore Alford, and Charles H. Meyer, the district court of the fourth judicial district of North Dakota, sitting for the county of Richland, in said State. Said original bill contained no allegations showing the residence or citizenship of any of the above-named complainants or fendants. It contained in substance the same allegations which e hereafter set out in full in the amended bill subsequently filed, d prayed for substantially the same relief which is prayed for in id amended bill.

That thereafter, on September 5, 1894, Sumner R. Clarke, one of e defendants named in said original bill of complaint, appeared r the first time in said district court, fourth judicial district of the ate of North Dakota, sitting for the county of Richland, and filed e following petition, duly verified, accompanied by a good and fficient removal bond, praying for the removal of said cause to

the circuit court of the United States for the district of North Dakota; whereupon, on said 5th day of September, 1894, said district court granted said petition and made an order for the removal of said cause as therein prayed for.

Said petition for removal of said cause to the circuit court of the United States for the district of North Dakota was in the words and figures following, to wit:

"In the District Court of the United States for the Fourth Judicial District.

STATE OF NORTH DAKOTA, *County of Richland,* } ss:

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, as Receivers of the Property of the Northern Pacific Railroad Company, Plaintiffs,

against

J. A. RICKERT, County Treasurer of Richland County, North Dakota; Chas. J. Bade, County Auditor Richland County, North Dakota; The County of Richland, North Dakota; D. C. Lake, S. H. Snyder, A. D. Stephens, Sumner R. Clarke, S. B. Zeigler, Wm. Butt, C. A. Dole, Andrew Walker, D. E. Lake, R. A. Darling, W. A. White, L. R. Freeman, N. Arntson, H. C. Sutherland, E. J. Dickey, Security Trust Company, a Corporation; Ingvald Reine, Wm. Britt, E. B. Ames, H. D. Stephens, Henry Jones, A. Ankefeldt, —— Blaiden, Whose First Name is Unknown; Lore Alford, Chas. H. Meyer, Defendants.

3 "To the honorable the district court of North Dakota held in and for the county of Richland:

"Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

"That there is in said suit a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, a controversy between said plaintiffs as receivers of the property of the Northern Pacific Railroad Company, on the one hand, of whom the said Thomas F. Oakes was at the time of the bringing of this suit and still is a resident and citizen of the State of New York, and of whom said Henry C. Payne was at the time of bringing this suit and still is a resident and citizen of the State of Wisconsin, and of whom said Henry C. Rouse was at the time of bringing this suit and still is a resident of the State of Ohio, as your petitioner avers, none of said plaintiffs being at the time of the bringing of this suit or at any time since a resident or a citizen of the State of Illinois or of the State of North Dakota, and on the other hand your petitioner and J. A. Rickert and Chas. J. Bade and the county of Richland, of whom your petitioner was at the time of the bringing of this suit and still is a resident and

citizen of the State of Illinois, and said Rickert, Bade, and said county were at the time of the bringing of this suit and still are residents of and citizens of the State of North Dakota; that said plaintiffs, on the one hand, and your petitioner, on the other, are actually interested in said controversy; that said Rickert, Bade, and said county are formal and proper parties to said controversy, but, as your petitioner avers, without any actual interest therein.

"Said controversy — of the following nature: Your petitioner in November, 1889, bought at the sale of lands in said Richland county for delinquent taxes of the year 1888 certain of the lands described in the Schedule A annexed to the complaint in said action Your petitioner did thereupon receive certificates of his said purchase in the usual form and did thereafter pay on certain of the lands

4 so purchased the taxes levied thereon in years subsequent to the year 1888; and the said lands not being redeemed from said sale, your petitioner in December, 1891, being still the holder and owner of said certificates and said lands not being redeemed from said sale, presented said certificates to the proper officer of said Richland county and demanded and received tax deeds of the lands so bought and not redeemed, and your petitioner is still the holder and owner of said tax deeds and of all the right, title, and interest in or to said lands by said tax proceedings given or conveyed. A particular description of the lands so purchased by your petitioner and remaining unredeemed, with a statement of the amount paid at tax sales for the several parcels of such lands, is here set forth in the following schedule, where, in the first column, is shown the description of the lands, in the second column the amount so paid at said sale."

(Here follows a description of the lands referred to and amounts paid at said sale, showing amount paid to be in excess of $2,000.)

"Your petitioner further shows that in said suit and in said controversy the plaintiffs seek to set aside and utterly avoid all and singular the tax proceedings on which said certificates and tax deeds were based and issued, and this without tendering to your petitioner or offering to pay to him or to deposit in court any part of the moneys so paid out by him to purchase said lands.

"Neither in said lands hereinbefore described nor in said tax proceedings, so far as such proceedings affect said lands or any of them, are any of the parties to said suit in any manner interested save the plaintiffs, on the one hand, and your petitioner and said Rickert and Bade and said county of Richland, on the other, the —— Rickert and Bade being officers of said county whom the plaintiffs seek in said suit to have commanded and required to cancel on their official records said tax proceedings, the said county of Richland having no interest in said controversy save as it may hereafter be compelled to pay and refund to your petitioner the moneys so paid out by your petitioner in case the plaintiffs in this suit obtain the relief prayed for. The said Rickert and Bade have not nor has either of them any interest in any of said lands or in said tax proceedings.

5 "The total amount paid by your petitioner for the purchase of the lands hereinbefore described at said tax sale exceeds twenty-five hundred dollars, and the total amount of the taxes for the year 1888 levied on the same lands exceeds two thousand dollars.

"Your petitioner has prepared separate answer and defense to the complaint of the plaintiffs in said suit, and resists and defends against said plaintiffs' demand to have said tax proceedings set aside and annulled, and on the contrary your petitioner claims an interest in said lands and a lien thereon for the moneys so paid by your petitioner at said sale and for subsequent taxes, and your petitioner further claims and asserts title to said lands and ownership thereof under said tax deeds.

"The value of said lands hereinbefore described is more than five thousand dollars, and so your petitioner says that the matter and amount in dispute in said controversy, exclusive of interest and costs, exceeds the sum or value of two thousand dollars.

"And your petitioner offers herewith a good and sufficient surety for his entering in the circuit court of the United States for the district of North Dakota on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said circuit court shall hold that this suit was wrongfully or improperly removed thereto.

"And he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and cause the record herein to be removed into said circuit court of the United States for the district of North Dakota, and he will ever pray.

"SUMNER R. CLARKE.
"EDGAR W. CAMP,
"*Solicitor for Sumner R. Clarke, Jamestown, N. D.*

"Filed Sept. 5th, 1894.

"JOHN SHIPPAM, *Clerk.*"

Thereafter, on July 1, 1895, the complainants first above named filed an amended bill of complaint against the following-named defendants, now appellees, to wit, Lore Alford, J. C. Gates, A. D. Stephens, Sumner R. Clarke, and D. C. Lake, without dis-
6 missing their bill as against the other defendants to the original bill heretofore named; which said amended bill of complaint was in words and figures following, to wit:

"Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific railway, a corporation created, organized, and existing under an act of Congress approved July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route,' by leave of court first had and obtained, bring this their amended bill of complaint against Lore Alford, J. C. Gates, A. D. Stephens, Sumner R. Clarke, and D. C. Lake.

"And thereupon your orators complain and say:

"I. That said Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route,' and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

"That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as shall be determined by said company within the territory of the United States on a line north of the 45th degree of latitude to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the State of Oregon.

"By the third section of said act lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land,
not mineral, designated by odd numbers, to the amount of
7 twenty alternate sections per mile on each side of said rail-
road line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.' * * *

"'Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided; and provided further, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal.' By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States should ap-

point three commissioners to examine the same, and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all other respects required by said act, the commissioners should so report to the President of the United States, and patents of lands, as aforesaid, should be issued to said company confirming to said company all right and title to said lands situated opposite to and coterminous with said completed section of said road, and that whenever from time to time twenty-five additional consecutive miles should have been constructed,
8 completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road should be so completed.

"II. That the said railroad company duly accepted the terms, conditions, and impositions of said act, and signified such acceptance in writing, under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, and within two years after the passage of said act, to wit, December 29, 1864, served such acceptance on the President of the United States.

"III. And your orators further aver that prior to the year 1888 said railroad company definitely fixed the line of its said railroad extending from the waters of Lake Superior to a point on Puget sound, and prior to said year constructed and caused to be constructed and put into operation a continuous line of railroad and telegraph extending from the waters of Lake Superior westerly across the State of Minnesota and the Territories of Dakota, Montana, Idaho, and Washington to the waters of Pugest sound; that as fast as portions of said railroad and telegraph line equal to or exceeding twenty-five miles in length were so constructed as aforesaid they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner in all respects as required by said act of Congress; that such reports were duly accepted and approved by the President of the United States, as provided in said act of Congress of July 2, 1864.

"That the portion of said railroad line extending from the Red River of the North to the Missouri river in the Territory of Dakota was definitely fixed prior to May 26, 1873, and that on that day a plat thereof, duly approved by the Secretary of the Interior, was filed in the office of the Commissioner of the General Land Office; that the lands described in Schedules 'A' and 'B,' hereunto annexed, which said schedules are here referred to and hereby made a part of this complaint, are coterminous with said portions of said railroad line and within forty miles thereof.

9 "That at the date of said grant to said railroad company and at the time the line of said railroad coterminous with the lands described in Schedules 'A' and 'B,' hereunto annexed, was

definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, as aforesaid, said lands were not reserved, sold, granted, or otherwise appropriated, and there were at said times no filings or entries or application to make filings or entry of any nature whatsoever upon or for said lands or any part thereof in the United States district land office for the district in which said lands were situate nor in the office of the Commissioner of the General Land Office, and no pre-emption or other claims or rights appeared on the records of said offices as having attached to said lands or any thereof; that said lands and all thereof were prior to the attempted assessments and tax levies hereinafter referred to surveyed by the United States or under its authority and were reported by the surveyors making such surveys to be agricultural lands and non-mineral in character.

"That after the construction and approval of said railroad and telegraph line, as aforesaid, and long prior to said attempted assessments and tax levies said railroad company prepared, in the form prescribed by the Secretary of the Interior, and filed with the register and receiver of the United States district land office for the district in which such lands were situate lists of lands claimed by said company as inuring to it under its said grant by virtue of the construction and approval of said portions of said railroad, including, among others, the lands described in said Schedules 'A' and 'B,' hereunto annexed, and at said times paid to the register and receiver of the United States district land office the fees to which they were by reason of such listing and filing entitled; that said lists were duly filed by said United States district land officers, and were thereupon, in accordance with the rules of practice of the Interior Department, transmitted to the office of the Commissioner of the General Land Office, to be held until said lands should be examined and it would be ascertained and determined whether they were mineral or non-mineral lands and were free from pre-emption or other claims or rights at the time the line of said railroad opposite was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office and until all claims thereto adverse to said railroad company's claim should be investigated and all contests decided.

"That thereupon the United States, as your orators are informed and believe, by its officers and agents in the Interior Department and in the General Land Office, began and have since proceeded with the examination of said lands and the adjustment of said grant as far as it affected said lands and to ascertain and determine whether said lands or any thereof were or are mineral in character or are for any reason excluded from the grant to said railroad company made by the act of Congress approved July 2, 1864, and the supplementary acts and joint resolutions, and to hear contests arising upon claims to said lands asserted adversely to the claim of said Northern Pacific Railroad Company; that such examination and adjustment is not yet completed, so far as it affects the lands described in Schedule 'A,' hereunto annexed, and said officers have not yet determined the character of said lands as to whether the

same are mineral or non-mineral and have not yet ascertained and determined whether the same were free from pre-emption or other claims or rights at the date of the said grant and at the time the line of said railroad was definitely located opposite said land and the plat thereof filed in the office of the Commissioner of the General Land Office or whether said lands were for any reason excluded from said grant or were granted to said railroad company; that such examination and adjustment was, long after the tax levies, proceedings, and sales hereinafter set forth, to wit, in the years 1892 and subsequent thereto, completed, so far as it affected the land described in Schedule 'B,' hereunto annexed, and it was ascertained and determined that said lands were at the date of the grant to said Northern Pacific Company and at the time the line of said railroad coterminous therewith was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office lands free from pre-emption or other claims or rights, and that said
11 lands were and are non-mineral in character, and the said lands were thereafter, to wit, a portion on June 24, 1892, and a portion on June 18, 1894, conveyed by the said United States to the said Northern Pacific Railroad Company by its certain letters patent duly issued under the great seal of the United States.

"But your orators further show and aver that after the said lists hereinbefore referred to were filed and transmitted to the office of the Commissioner of the General Land Office, as hereinbefore set forth, and prior to the attempted tax levies and proceedings hereinafter set out a claim to the lands described in Schedules 'A' and 'B' and each and every part thereof adverse to the claim of said railroad company was set up by the United States, and the claim of said railroad company thereto was questioned, denied, and contested; that said contest was pending at the time of said attempted assessments and tax levies hereinafter described, and, as to the lands described in Schedule 'A,' is still pending.

"That such controversy and contest was and is over questions of fact; that at the time of said attempted assessments and tax levies said lands described in Schedules 'A' and 'B' had not been and, except as to the lands described in Schedule 'B,' are not now certified or patented to said railroad company, and the said lands were not ascertained or determined to be a part of the lands granted to said company, nor were they nor are they, except as to the lands described in Schedule 'B,' segregated from the public lands of the United States; that at the time of the assessments and tax levies the United States had and asserted as to all the lands described in the said schedule hereunto annexed, and, except for the lands described in Schedule 'B,' still has and asserts a potential claim thereto because of the non-identification thereof as a part of the lands granted to said railroad company; that the United States Supreme Court has held and decided that until the patents are issued therefor the lands within odd-numbered sections within the limits of the Northern Pacific grant are 'lands belonging to the United States,' free and open to exploration for mineral deposits within the pro-

visions of chapter six, title thirty-two, of the Revised Statutes
12 of the United States, and the appropriation under said chapter upon the discovery of valuable mineral deposits therein.

"And your orators further believe and aver that some portions of the lands described in Schedule 'A,' hereunto annexed, will, when the same shall have been examined by the officers of the Interior Department and the adjustment of said grant, as far as it relates to said land, shall have been completed, be held and determined to be mineral land or to have been land not free from pre-emption or other claims or rights at the date of the grant or at the time the line of said railroad coterminous therewith was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office and so excluded from the grant to said Northern Pacific Railroad Company, while others of said lands will be held and determined to be agricultural lands, free from pre-emption or other claims or rights at the dates of the grant and definite location, and to be within the grant to said company; but your orators do not know and cannot ascertain and are unable to show unto your honors, upon information, belief, or otherwise, what particular tracts or parcels of land will be held and determined to be mineral land or to have not been free from pre-emption or other claims or rights at the time the line of said road coterminous therewith was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office and at the date of the grant or what particular lands will be finally held and determined to have passed to said railroad company under said grant.

"That because said lands described in Schedules 'A' and 'B' were at the time of said attempted assessments and tax levies not defined or identified or susceptible of identification as a part of the lands granted to said railroad company and were not segregated from the public lands of the United States, and because said lands described in Schedule 'A' are not now so identified and defined and segregated or susceptible of identification, definition, and segregation, and because of the existence of the claims by the United States to said lands described in Schedule 'A' and 'B' adverse to the claim of said railroad company in and to said lands, as hereinbefore set forth, and because of the existence of the contests
13 thereover pending in the Interior Department, and because said land grant was not at the time of said attempted assessments and tax levies adjusted as far as it related to said lands and is not now, so far as it relates to the lands described in Schedule 'A,' said lands were not nor was any portion thereof subject to assessment or taxation for or during the year 1888.

"IV. And your orators further show that the delay in identifying and segregating from the public lands of the United States the lands granted by said act of July 2, 1864, to said railroad company and in certifying and patenting to said company the granted lands is not, as your orators are informed and believe, the result of any action, failure, or neglect or default on the part of said company or of your orators as the receivers thereof; that the said railroad company and your orators, as the receivers thereof, as heretofore de-

scribed, have diligently and at all times endeavored to obtain the identification of and to secure patents for said lands, and have done everything in their means and power to obtain such identification, segregation, and issuance of patents, but such delay was and is solely because of the adverse claims to said lands, as hereinbefore stated, and that the United States might and may have sufficient opportunity to examine and cause to be examined said lands so that it may determine their mineral or non-mineral character and whether they were free from pre-emption or other claims or rights at the time of said grant and at the time the line of said railroad coterminous therewith was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, and thus segregate from the public lands of the United States those lands which inure to said railroad company under said grant, and that the United States might thus be enabled to collect the cost of surveying and conveying those lands which so inured under said grant and to issue patents therefor to said company.

"V. And your orators further show that the Farmers' Loan and Trust Company is a corporation created, organized, and existing under the laws of New York and is a citizen and resident thereof.

14 "VI. And your orators further aver that a joint resolution of Congress approved May 31, 1870, entitled 'A resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgage, and other purposes,' authorized the said railroad company to issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgages on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation.

"That thereafter, to wit, November 20, 1893, the said railroad company, pursuant to the authority in said joint resolutions conferred, made, executed, and delivered its certain trust deed or mortgage, known as the general second mortgage, wherein and whereby it conveyed to said Farmers' Loan & Trust Company of New York all and singular its railroad and telegraph line or lines, then constructed and being constructed, and to be constructed, from a point on Lake Superior in the State of Wisconsin to Tacoma, on Puget sound, with the rights, privileges, immunities, and franchises connected with and relating to said lines of railroad and line or lines of telegraph and the construction, operation, maintenance, use, and enjoyment thereof and all corporate and other franchises of any nature relating thereto, including the franchise of such railroad company to be a corporation; also all the lands granted by the Congress of the United States to aid in construction and equipment of the entire of said main line and branch railroad; also all the indemnity lands, wherever the same shall be situated, that shall or may be acquired to supply deficiencies in the quantity of said granted lands in pursuance of and in accordance with the terms and provisions of said grant; that said trust deed or mortgage so made was made to secure certain bonds to be issued by said company to

an amount not exceeding twenty millions of dollars; that large amounts of said bonds were so issued, and there is now outstanding thereof $19,216,000.00.

"That thereafter, to wit., December 1, 1887, the said Northern Pacific Railroad Company made its certain other mortgage, known as the general third mortgage, by which it conveyed, by way
15 of mortgage and in trust to said Farmers' Loan & Trust Company of New York, all its railroad and telegraph lines, Cascade branch, land grant (including such indemnity lands as were then or might thereafter be acquired to supply deficiencies in the quantity of granted land), property, equipment, and franchises acquired and to be acquired for use in connection with its said railroads or its business, including its franchise to be a corporation, to secure the issue of its fifty-year six per cent. sinking fund gold bonds to an amount not to exceed in the aggregate twelve million dollars; that of said mortgage bonds there have been issued and are now outstanding bonds to the aggregate amount of $11,461,000.00; that thereafter, to wit, December 2, 1889, the Northern Pacific Railroad Company made its certain other mortgage, known as its consolidated mortgage, by which it conveyed by way of mortgage and in trust to said Farmers' Loan and Trust Company of New York all its railroad and telegraph line, Cascade branch, land grant (including such indemnity lands as were then or might thereafter be acquired to supply deficiencies in the quantity of granted lands), property, equipment, franchises acquired or thereafter to be acquired for use in connection with said railroad and its business, including its franchise to be a corporation, to secure the issue of its hundred-year five per cent. gold bonds not to exceed in the aggregate one hundred and sixty millions dollars; that of said bonds so secured there have been issued and are now outstanding bonds to the aggregate amount of $62,329,000.00.

"VII. And your orators further aver that in the year 1893 the said Northern Pacific Railroad Company was insolvent and unable to meet the interest upon its said bonds so issued and outsanding and to pay its debts, and that August 14, 1893, P. B. Winston, a bondholder of said company; The Farmers' Loan & Trust Company: William C. Sheldon, George F. Sheldon, William S. P. Prentice, and William C. Sheldon, Jr., copartners, doing business under the firm name and style of William C. Sheldon & Company, creditors of said company, filed their bill of complaint in the United States — for the District of North Dakota, wherein, among other things, they prayed that receivers might be appointed of all the property of said Northern Pacific Railroad Company; that on the same day, on application of said complainants, said defend-
16 ant, The Northern Pacific Railroad Company, thereto consenting, the said court, then and there having jurisdiction, by an order duly made, appointed your orators, said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, the receivers of said court of all and singular the said defendant Northern Pacific Railroad Company and of the lands, railroads, assets, and property of said company within the jurisdiction of said court, and authorized and

directed said receivers to take possession of all and singular such property wherever situate or found, and to protect the title and possession of the same; and the said court, then and there, by its said order, commanded and enjoined the officers, directors, and employees of said Northern Pacific Railroad Company and all other corporations soever from interfering in any way with the possession and management of any part of the property over which the receivers were appointed or interfering in any way with the discharge of their duties as such receivers.

"That thereafter, the said railroad company having made default in the payment of the interest upon its said bonds secured by the mortgages hereinbefore referred to, and having made default in the terms and conditions of said mortgages, the said Farmers' Loan & Trust Company, on the 25th day of October, 1893, commenced in said United States circuit court for the district of North Dakota, by duly filing its bill of complaint therein and causing a subpœna to be issued and served upon the defendants, an action against the said Northern Pacific Railroad Company, Philip B. Winston, and William C. Sheldon; G. R. Sheldon, William S. B. Prentice, and William C. Sheldon, Jr., copartners, doing business under the firm name and style of William C. Sheldon & Company, and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers for the Northern Pacific Railroad Company, for the foreclosure of said described mortgages; that by an order duly made and entered by said court on said day said action was consolidated with said prior action, and your orators, the said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, were appointed receivers of the Northern Pacific Railroad Company and of the property of said company, as in said order appointing them, made in the court August 14, 1893, with the right, powers, and privileges in said order set forth, and their said receivership was extended to the said consolidated cause and since
17 continues; that after their appointment as such receivers, both in said original creditor's suit and in said foreclosure suit, your orators duly qualified and filed their bonds as required by the order of the court; that said receivers are fully authorized and empowered to institute and prosecute all such suits, actions, and proceedings as may in their judgment be necessary to protect the property vested in them and committed to their charge as such receivers.

"That at the time of the appointment of your orators as such receivers said Northern Pacific Railroad Company claimed and had an interest under the said act of Congress approved July 2, 1864, and its acts taken in accordance therewith, as hereinbefore set forth, in and to the lands described in schedule 'A' and 'B' hereunto annexed, which said interest was subject to the liens of the mortgages hereinbefore referred to; that your orators, under the orders and directions of said court, proceeded to take into their custody as such receivers all of the said described lands, and have since so retained the same; that thereafter, to wit, November 27, 1893, your orators were by said court authorized and directed to proceed with the adjustment of the land grant to said railroad com-

pany, and to do any and all things by them deemed necessary to that end.

"And your orators show that they have, since their appointment as aforesaid, endeavored, and are endeavoring, and taking all steps necessary to that end, to obtain the adjustment of said land grant to said company, and to obtain a final determination by the United States as to what lands claimed by your orators as inuring to said railroad company under the terms of said act do in fact so inure; and to have the granted lands defined and identified and segregated from the public lands of the United States; and to have the patents therefor issued by the United States to said railroad company; that as yet your orators have not been able to obtain patents for those lands described in schedule 'A' hereto annexed, which pass under said grants, because there is, as your orators are informed and believe, an adverse claim existing thereto, and because the United States have not yet examined said lands or
18 any thereof, or ascertained or determined whether or not said lands inure to said company under the terms of said act of July 2, 1864.

"VIII. And your orators further show that the lands described in said schedules 'A' and 'B' are in the county of Richland and State of North Dakota.

"That by an act approved March 9, 1883, entitled 'An act to provide for the levy and collection of taxes upon the railroad property of railroad companies in this Territory,' the legislature of the Territory of Dakota, provided among other things as follows, to wit:

'In lieu of any and all other takes upon any railroads except railroads operated by horse power, within this Territory or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this Territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this Territory, as hereinafter stated, that is to say:

'Every such railroad corporation or person operating a railroad in this Territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually as aforesaid, shall be and is in full of all taxation and assessments whatsoever, upon the property aforesaid. The said payments shall be made one-half ($\frac{1}{2}$) on or before the fifteenth day of February and one-half ($\frac{1}{2}$) on or before the fifteenth day of August in each year, and for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such gross earnings shall be kept by said company.'

"That by an act approved March 7, 1889, entitled 'An act for the levy and collection of taxes upon property of railroad companies in

this Territory,' the legislature of said Territory, among other things, enacted and provided as follows, to wit:

"'In lieu of any and all other taxes upon any railroads except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances and appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads upon the capital stock or business transactions of said railroad company there shall hereafter be paid into the treasury of this Territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operating of such railroad, as shall be situated within this Territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided.

"'Every such railroad corporation or person owning or operating or that may hereinafter own or operate any line of railroad in this Territory which shall have accepted this act, shall pay to said treasurer each year "for the first five years" after the approval of this act an amount equal to three per centum of such gross earnings,
"and for and in each and every year after the expiration
19 of such five years an amount equal to two per centum of said gross earnings," and the payment of such amount annually as aforesaid shall be and in full of any and all other taxation and assessment whatever upon the property aforesaid.

"'7. Any railroad company which at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this Territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the secretary of the Territory, accept and become subject to the provisions of this act, and provided that any railroad company which is now in arrears in the payment of taxes assessed under chapter 99, of the laws of 1883, shall within thirty days after the passage of this act pay into the territorial treasury the full amount of the taxes and interest due under the assessments under the said laws of 1883, before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and taxation of the property of individuals of this Territory and said taxes shall be collected in the same manner provided for the assessment and taxation of the property of individuals of this Territory and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the session laws of 1883, by paying all taxes claimed on gross earnings both territorial and interstate or by filing account of the gross earnings both territorial and interstate, shall prepare and file such account in the manner therein provided

within thirty days from the passage hereof, and pay one-half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the Territory on local and interstate earnings of such companies, but remaining unpaid at the time of filing said account and within thirty days after the passage of this act or the same shall not apply to said company or companies. The balance of said taxes due for the current year shall be paid to the territorial treasury on or before the 15th day of August, 1889.'

"That the said Northern Pacific Railroad Company, prior to and during the years 1886, 1887, 1888, and 1889, operated by steam power a railroad in said Territory, and did within thirty days after the passage of said act of March 7, 1889, by resolution of its board of directors, attested by its secretary and filed with the secretary of the Territory of Dakota, accept and become subject to the provisions of said act as aforesaid, and within thirty days after the passage of the same prepared and filed with the treasurer of the said Territory in the manner required by chapter 99, of the session laws of the Territory of Dakota for the year 1883, an account of the gross earnings of said railroad company, both local and interstate, for the years 1886, 1887, and 1888, and paid into the treasury of said Territory the entire amount of taxes and interest theretofore claimed by said Territory as due from said company on local and interstate earnings but remaining unpaid at the time of filing said account, such payments being as follows, to wit: for the latter half of
20 the year 1886, $38,095.31; for the year 1887, $65,585.46; said payment for the latter half of the year 1886 being one-half of the percentage computed in accordance with the provisions of said act of 1883 upon the gross earnings of said company, both local and interstate, for said year; said payment for the year 1887 being the percentage computed in accordance with said act upon the gross earnings of said company for said year derived from interstate business, the percentage for said year computed upon the gross earnings of said company derived from intrastate business having been theretofore paid by said company as required by said act; and said company further paid into said treasury at said time, in accordance with the provisions of said act of 1883, the further sum of $46,937.09, being one-half of the entire amount claimed by said Territory as due from said company as percentages computed upon its gross earnings, both intrastate and interstate, for the year 1888, in accordance with the provisions of said act of 1883; and, further, on or about August 15, 1889, said company paid into said treasury the further sum of $46,937.09, being the remaining one-half of the sum claimed as taxes by said Territory to be due as aforesaid for said year 1888 as aforesaid.

"IX. And your orators further show that prior to and during the year 1888 the following-named railroad companies operated railroads by steam power in said Territory of Dakota, and owned and so operated the following number of miles of railroad within said Territory, respectively, to wit:

	No. of miles.
St. Paul, Minneapolis & Manitoba Railway Co.	1,187
Chicago, St. Paul, Minneapolis & Omaha R'y Co.	88
Burlington, Cedar Rapids & Northern R. R. Co.	82
Minneapolis, St. Paul & Sault Ste. Marie R. R. Co.	99
Wisconsin, Minnesota & Pacific R. R. Co.	39
Black Hills & Fort Pierre R. R. Co.	15
Cherokee & Dakota R. R. Co.	15
Chicago, Milwaukee & St. Paul R. R. Co.	1,215
Chicago & Northwestern R. R. Co.	757
Fremont, Elkhorn & Missouri Valley R. R. Co.	122
Northern Pacific Railroad Company	378
James River Valley R. R. Co.	64
Northern Pacific, LaMoure & Mo. River R. R. Co.	21
Jamestown & Northern R. R. Co.	102
Northern Pacific, Fergus & Black Hills R. R. Co.	42
Sanborn, Cooperstown & Turtle Mountain R. R. Co.	36
Southeastern Dakota R. R. Co.	9
Fargo & Southwestern R. R. Co.	87
Duluth & Manitoba Railroad Company	96

21 "That during all of said period said railroad companies owned property within said territory subject to taxation therein, consisting of said mileage and railroad equipments, appendages, and appurtenances, to overthe amount respectively of the sum set opposite the names of said companies, to wit:

St. Paul, Minneapolis & Manitoba R. R. Co.	$3,461,000
Chicago, St. Paul, Minneapolis & Omaha R. R. Co.	264,000
Burlington, Cedar Rapids & Northern R. R. Co.	246,000
Minneapolis, St. Paul & Sault Ste. Marie R. R. Co.	297,000
Wisconsin, Minnesota & Pacific R. R. Co.	117,000
Black Hills & Fort Pierre R. R. Co.	45,000
Cherokee & Dakota R. R. Co.	45,000
Chicago, Milwaukee & St. Paul R. R. Co	3,645,000
Chicago & Northwestern R. R. Co.	2,271,000
Fremont, Elkhorn & Missouri Valley R. R. Co.	366,000
Northern Pacific Railroad Company	1,134,000
James River Valley R. R. Co.	192,000
Northern Pacific, La Moure & Mo. River R. R. Co.	63,000
Jamestown & Northern R. R. Co.	306,000
Northern Pacific, Fergus & Black Hills R. R. Co.	126,000
Sanborn, Cooperstown & Turtle Mountains R. R. Co.	108,000
Southeastern Dakota R. R. Co.	27,000
Fargo & Southwestern R. R. Co.	261,000
Duluth & Manitoba R. R. Co.	288,000

"That the county assessors for the various counties within which the said property was situated knowingly and wilfully omitted from their assessment-rolls for the year 1888 all such portions of said property as lay within their respective counties and failed to

assess the same for the purpose of taxation, and no territorial, county, town, or other tax was levied upon said property or any of it for or during the year 1888, and that by reason of the omission to so assess said property and to levy taxes on the same the amount of the taxes levied by said county of Richland on said lands described in the said Schedules 'A' and 'B' for the year 1888 was greatly increased, and that said increase of taxes upon these lands resulting from such omission cannot be segregated from the taxes which might otherwise be due from said lands if the same were taxable; that during all of said year 1888 certain portions of said property of a value exceeding the following amounts, to wit, $153,000 owned and controlled by said Chicago, Milwaukee & St. Paul Railroad Company, $222,000 owned and controlled by said St. Paul, Minneapolis & Manitoba Railway Company, $102,000 owned and controlled by said Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, were within said county of
22 Richland; that during said year all of said railroads hereinbefore named were engaged in interstate commerce and engaged in the business of carrying freight and passengers between the said Territory of Dakota and other Territories and States.

"X. And your orators further show that, notwithstanding the premises, in the year 1888 the county and township assessors of said county of Richland prepared a certain pretended assessment-roll of property in said Richland county, and on or before the first Monday in July, 1888, delivered the same to the county clerk of said county.

"That — September 3, 1888, the board of county commissioners of said Richland county met at the county-seat of said county and made the following tax levy, to wit:

"County general fund, two mills on the dollar; county road and bridge fund, five-tenths mills on the dollar; county sinking fund, one mill on the dollar.

"That on said day the county auditor of said Richland county levied two mills on the dollar for general school fund, and reported the tax as levied by the Territory of Dakota as follows:

"For general purposes, three and one-tenth mills on the dollar; for stock indemnity fund, four-tenth- mills on the dollar.

"That thereafter the county clerk of said county made out a certain pretended tax-list, purporting to describe the taxable property in said county, and, having prepared a duplicate thereof, delivered such duplicate to the county treasurer of said county; that thereafter, the said pretended tax remaining unpaid, the said treasurer, on the fourth day of November, 1889, attempted and pretended to sell to the following persons the following-described parcels and tracts of land, viz:"

(Here follows a list of lands described by section, township, and range which were sold to the defendants A. D. Stephens, Sumner R. Clarke, D. C. Lake and to one S. H. Snyder, all of said lands so described being a portion of the lands also described in Exhibits "A" and "B," referred to and annexed to the bill of complaint.)

23 "And your orators further show upon their information and belief that after such pretended sales said county treasurer executed and delivered to each of said purchasers certificates in writing describing the lands so pretended and attempted to have been sold.

"And your orators further show unto your honors that they believe that said certificates were in the form prescribed by section 67 of chapter 28 of the Political Code of 1877 of Dakota Territory, but they have been and are unable to obtain a copy thereof or to examine the same and are unable to show unto your honors with respect thereto except as hereinbefore set forth.

"And your orators further show upon their information and belief that thereafter said S. A. Snyder duly assigned and transferred to said Lore Alford and J. C. Gates, defendants herein, such certificates of sale.

"And your orators further show upon information and belief that thereafter, there having been no redemption from said sales, the persons hereinafter mentioned, defendants herein named, presented to the treasurer of said county such certificates of purchase of certain of said lands and demanded deeds therefor; that thereupon said treasurer executed to said persons, in the name of the Territory of Dakota, deeds purporting to convey said lands to said persons; that there *was* so executed and delivered to the following-names persons respectively such deeds for the lands herein described immediately following the names of such persons, viz:"

(Here follows list of lands conveyed and persons to whom conveyed.)

* * * * * * *

"That said deeds have not been recorded in the office of the register of deeds and your orators have been and are unable to obtain copies of or to examine said deeds or any thereof and cannot show unto your honors as to the sufficiency of said deeds or of the execution thereof, but your orators believe that said deeds are in the form prescribed by the laws of North Dakota and were executed in the manner prescribed by said law; and your orators further
24 show upon information and belief that said defendants claim and pretend that said deeds were duly executed in the manner and form prescribed by the laws of the State of North Dakota and are sufficient to convey to the said defendants the title of the lands described therein.

"Your orators further show, however, that it appears from the records in the office of the county treasurer of said county that such deeds and tax certificates were executed and delivered as hereinbefore averred; that thereby great and irreparable injury is caused, and your orators show that said deeds and certificates constitute and are a cloud upon the title of the lands described therein; that the defendants herein, the grantees under said deeds, claim and assert an interest thereunder in and to the lands described in said deeds and threaten and intend to record said deeds; that said persons to whom such certificates of sale were issued and their assigns, de-

fendants herein, claim a lien upon the lands described in such certificates for the amount of the purchase price of said certificates and claim and pretend to have an interest in and to said lands under and by virtue of said tax sales.

"XI. And your orators further show that said pretended taxes levied as aforesaid on said lands described in said Schedules 'A' and 'B' and said pretended sales for said pretended taxes are illegal and void for the following reasons:

"(1.) That the several county and township assessors for said county of Richland did not, during the year 1888, make out, and did not make out and deliver to the county clerk of said county of Richland, any assessment roll or rolls prepared in substantially the form prescribed by section 1582 of the Compiled Laws of Dakota for 1887.

"(2.) The said township and county assessors did not list and assess in the year 1888 the lands described in said Schedules 'A' and 'B' or any of said lands and omitted from the township and county assessment-rolls for the said year the descriptions of said lands, and the descriptions of said lands do not appear in said roll.

"(3.) The said township and county assessors did not make out and deliver to the county clerk of said county, on or before the first Monday of July, 1888, or at all, any assessment-roll containing a list of all the taxable lands in such county in numerical order, beginning with the lowest section in the lowest-numbered township in the lowest-numbered range in said county and ending in the highest-numbered section, township, and range; that immediately following the description of lands in township 131 north of range 47 west on said assessment-roll is the description of certain lands in townships 131 and 132 north of range 52 west; that the description of the lands described in Schedules 'A' and 'B' situated in ranges 48, 49, 50, and 51 is placed in said assessment-roll after the description of a portion of the lands contained in range 52 west.

"(4.) That said lands described in said Schedules 'A' and 'B' were not assessed to said Northern Pacific Railroad Company for said year 1888, although said township and county assessors well knew that, except for the claims of the United States thereto, said Northern Pacific Railroad Company was the sole claimant thereof.

"(5.) That the assessment-roll for said county of Richland for the year 1888 does not show the number of the school and road district in which said lands described in Schedules 'A' and 'B' or any of them were situated.

"(6.) The board of county commissioners of said county of Richland did not hold a session of two days, commencing on the first Monday of July, 1888, as a board of equalization for the purpose of equalizing and correcting the assessment-roll for said county of Richland.

"(7.) That the levy for the general territorial tax for the year 1888 upon the lands described in Schedules 'A' and 'B,' hereunto annexed, was in excess of the amount authorized by law, being three and one-tenth mills on the dollar.

"(8.) That the board of county commissioners for said county of Richland in said year 1888 levied the tax for the county bridge fund and for the county road fund together in bulk and not separately, and the amount levied on said lands described in Schedules 'A' and 'B' for said year for said funds was levied in bulk and not separately.

26 "(9). That the county clerk of said county of Richland did not after the levy of said taxes, as hereinbefore set forth, make out a tax-list in substantially the form required by section 1595 of the Compiled Laws of Dakota for 1887.

"(10). No description of said lands described in Schedules 'A' and 'B' was included in the tax-list of said county of Richland for the year 1888.

"(11). The tax-list of said county of Richland for said year 1888 did not contain a list of all the taxable lands in said county (not included in town lots) in numerical order, commencing in the lowest-numbered section in the lowest-numbered township in the lowest-numbered range in said county and ending in the highest-numbered section, township, and range, but immediately following the description of certain lands in range 47 west appears the description of certain lands situated in townships 131 and 132, range 52 west; that the description of all the lands in Schedules 'A' and 'B,' hereunto annexed, which are within range- 48, 49, 50, and 51 west are after the descriptions of said lands in range 52 west in said tax-list.

"(12). Said tax-list for said county of Richland for the year 1888 failed to specify the years for which said lands described in said Schedule- 'A' and 'B' had been sold for taxes and not redeemed, although said lands had been so sold for taxes levied thereon for years prior to 1888 and had not been redeemed from such sale.

"(13). The treasurer of said county of Richland did not, prior to the attempted sale of said lands for the taxes attempted to be levied thereon for the year 1888, as hereinbefore set forth, give notice that he would sell the separate parcels of lands described in Schedules 'A' and 'B' hereunto annexed, for the taxes attempted to be levied thereon for the year 1888 or the preceding years and did not publish any other or further notice than the following, to wit:

27 "'*Delinquent Tax Sale.*

"'TERRITORY OF DAKOTA, } ss:
County of Richland, }

"'WAHPETON, *Oct. 2nd*, 1889.

"'Notice is hereby given that I shall proceed to sell at public auction, at the office of the county treasurer, at the court-house, in the city of Wahpeton, on Monday, November 4, 1889, at 9 o'clock a. m., the following-described lands and lots in the county of Richland, Territory of Dakota, or as much thereof as will pay the taxes,

with penality and interest, cost for advertising, fees for selling, for the years 1888 and 1887, unless the same are previously paid.

"'O. K. ULSAKER,

"' *Treas. Richland Co., D. T.*'

following such notice with a description of the lands advertised to be sold; that the said pretended notice did not contain the amount of taxes due or claimed to be due upon said lands.

"(14.) That the south half of the northeast quarter of section thirty-three, township 136 north, of range fifty-one west, P. M. North Dakota, were omitted from the published notice of sale for the taxes for said year 1888.

"(15.) In making said attempted sale, said county treasurer failed to offer for sale or to sell the smallest portion of each of said parcels of land that would bring the amount of the taxes, penalty, interest, or costs claimed to be due on such parcel, but offered and sold each of such parcels as an entirety.

"(16.) Said county treasurer of Richland county did not, after the attempted sale of said lands described in schedules 'A' and 'B,' hereunto annexed, file in the office of the county clerk a return of such sale, showing the lands sold or the names of the purchasers and the sums bid by them, or a copy of the notice of the sale with a certificate of the advertisement, verified by an affidavit, or any return.

"And your orators further show that said deeds so issued are void for the reason that the said county auditor of said county did not, prior to the issuance thereof, cause a notice to the persons in whose names such lands were assessed, specifying the description of such lands, the amount for which the same were sold, the amount required to redeem such lands from sale, exclusive of the cost
28 to accrue upon such notice, and the time when the redemption period would expire, to be published once in each week for three consecutive weeks in some newspaper printed and published in said Richland county, although there were, at all of said times, newspapers printed and published in said county.

"XII. And your orators further show that said defendant-, Lore Alford, J. G. Gates, A. D. Stephens, Sumner R. Clarke, and D. C. Lake, claims some interest in said lands described in said schedules 'A' and 'B,' and in certain portions thereof adverse to your orators and arising under said tax proceedings and the sales made thereunder.

"XIII. And your orators show that they hereby tender and offer to pay whatever taxes or amounts necessary to redeem said lands from sale for said pretended taxes of 1888, as may be found and determined in this action to be legally and equitably due to said defendants or any of them.

"XIV. And your orators further show upon information and belief that the said county of Richland is bankrupt; that it owes large sums of money, and that its county warrants are not worth their face value; that if your orators were to redeem any of said lands from said pretended tax sales and thereafter bring suits for amounts

so paid for such redemption and recover judgment therefor against said county, said judgment or judgments would be uncollectable, and would be paid, if at all, in said depreciated county warrants.

"XV. Your orators further show that the lands described in said schedules 'A' and 'B' are wild, vacant, and unoccupied, except where occupied by tenants of your orators, and that said lands so claimed by each of said defendants is of the value of over two thousand dollars; that the cost of redemption from the tax certificates held by each of said defendants would be over two thousand dollars respectively.

"Forasmuch as your orators can have no adequate relief except in this court, and to the end therefor that the defendants may, if they can, show why your orators should not have the relief hereby prayed, and make a full discovery and disclosure of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and
29 perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived.

"May it please your honor to grant unto your orator a writ of subpœna of the United States of America directed to the said Lore Alford, J. C. Gates, A. D. Stephens, Sumner R. Clarke, and D. C. Lake, commanding them on a day certain to appear and answer unto this amended bill of complaint and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

"And your orators further pray:

"First. That your honors may enter an order herein adjudging and decreeing that the lands described in said schedules 'A' and 'B,' hereunto annexed, and each and all thereof were not subject to assessment and taxation by the said county for the year 1888.

"Second. That your honors may enter an order decreeing that said pretended and attempted assessments and tax levies were and are null and void, and that all certificates and deeds issued under and by virtue of the same are illegal and void and are clouds upon the title to said described lands.

"Third. That the said defendants, Lore Alford, J. G. Gates, A. D. Stephens, Sumner R. Clarke, and D. C. Lake, be required to disclose unto your orators the extent and nature of the interest, if any, claimed by them in or to the land described in said schedules 'A' and 'B,' hereunto annexed, or of any of said land, and that they and each of them be directed and commanded to produce in the trial of this cause all tax certificates, deeds, and instruments in writing purporting to convey to them or any of them any interest in or lien upon said lands described in said schedules 'A' and 'B' or any thereof, and to disclose unto your orators in their answer herein true and correct copies of such certificates, deeds, and instruments in writing.

"Fourth. That the adverse claim of said defendants, Lore Alford, J. G. Gates, A. D. Stephens, Sumner R. Clarke, and D. C. Lake,

be determined and adjudged to be void, and that all tax cer-
30 tificates, deeds, and instruments in writing, purporting to convey to said defendants or any of them be decreed to be void, and a cloud upon the title to said land, and that said defendants be required to deliver up the same for cancellation, and that said defendants and each of them be decreed to have no estate or interest whatsoever in or to the said lands or any part thereof under and by virtue of said pretended taxes and assessments, or any certificates or deeds issued under or by virtue of the same; that said defendants and each of them, their, and each of their heirs, executors, administrators, and assigns be forever enjoined and restrained from asserting any claim whatsoever in and to the said lands and premises adverse to your orators or to said Northern Pacific Railroad Company under and by virtue of said assessments and taxes, or any sale made or certificate or deed issued under or on account of said assessment or taxes.

"Fifth. For such other and further relief in the premises as is consistent with equity and good conscience."

(Attached to said amended bill of complaint were Schedules "A" and "B," referred to therein, containing a description of the lands referred to in the bill by section, township, and range.)

Thereafter, on December 2, 1895, the above-named defendants, Lore Alford, J. C. Gates, A. D. Stephens, Sumner R. Clarke, and D. C. Lake (now appellees), filed the following joint and several demurrer and answer to the aforesaid amended bill of complaint, to wit:

"United States Circuit Court for the District of North Dakota, Southeastern Division.

"THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, as Receivers of the Northern Pacific Railroad Co., Plaintiffs,

vs.

LORE ALFORD, J. C. GATES, A. D. STEPHENS, SUMNER R. CLARKE, and D. C. LAKE, Defendants.

"The joint and several demurrers to part and the joint and several answer of the said defendants to the residue of the original bill of complaint of the above-named plaintiffs.

31 "These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill to be true in such manner and form as the same are therein set forth and alleged, demur to so much of the plaintiffs' said bill as is contained and set forth in the first, second, third, fourth, fifth, sixth, seventh, tenth, twelfth, thirteenth, fourteenth and fifteenth paragraphs of said bill, and for cause of demurrer they show:

"That it appeareth by the plaintiffs' own showing and by the said parts of the said bill that the plaintiffs are not entitled to the discovery or relief prayed by the said bill, and that the said plaintiffs have not in and by said parts of the said bill made or stated such a case as doth or ought to entitle them to any such discovery

or relief as is thereby sought and prayed for from and against these defendants.

"Wherefore these defendants demand the judgment of this honorable court, whether they shall be compelled to make any other or further answer to the said parts of the said bill or any of the matters and things therein contained.

"And these defendants do demur to so much of the plaintiffs' said bill as is contained and set forth in the first, second, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, thirteenth, fourteenth, and fifteenth paragraphs of said bill, and for cause of demurrer they show:

"That the said praintiffs have not in and by the said parts of said bill made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from and against these defendants.

"Wherefore these defendants demand judgment of this honorable court whether they shall be compelled to make any other or further answer to the said parts of the said bill or any of the matters and things therein contained.

"And these defendants do demur to so much of the said bill as is set forth in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth paragraphs of said bill, and to the matter set forth in the third, fourth, fifth, eighth, ninth, tenth, eleventh, twelfth,
32 thirteenth, fourteenth, fifteenth, and sixteenth subdivisions of paragraph eleven of said bill, and in paragraphs twelve, thirteen, fourteen, and fifteen of said bill, and for cause of demurrer they show:

"That the said plaintiffs have not in and by the said parts of said bill made or stated such a cause as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from and against these defendants.

"Wherefore these defendants demand judgment of this honorable court whether they shall be compelled to make any other or further answer to the said parts of the said bill, or any of the matters and things therein contained.

"And to the residue of the said bill—that is to say, to the discovery and relief prayed by virtue of the matters alleged in subdivisions one, two, six, and seven of said paragraph eleven, these defendants, for answer thereto, severally say:

"They admit the allegations contained in paragraphs one and two of said bill to be true; they admit the allegations contained in paragraphs five, six, and seven of said bill to be true; they admit that in the year 1888 the county township assessors of said county prepared an assessment-roll of property in said county, and on or before the first Monday in July delivered the same to the county clerk of said county.

"That September 3rd, 1888, or thereabouts, the county commissioners of said county made a tax levy substantially as set forth in said paragraph ten.

"That thereafter the county clerk of said county made out a tax-list purporting to describe the taxable property in said county and

delivered a duplicate to the county treasurer of said county, and thereafter the said taxes remaining unpaid, said treasurer, on or about the fourth day of November, 1889, sold the parcels of land to the persons named in said paragraph ten, substantially as therein set forth, and they show that one of said certificates was in the words and figures following:

"'No. 247. *County Treasurer's Certificate of Tax Sale.*

"'THE STATE OF NORTH DAKOTA, }
County of Richland. }

"'I, O. K. Ulsaker, treasurer of the county of Richland, do
33 hereby certify that the following-described real estate in said county, to wit:

West ½ section 21, township 135, range 51, 320 acres, valuation	$800 00
Taxes, $24.48; interest (penalty and costs), $5.04; total	$29 52
Certificate	50
	$30 02

was on the fourth day of November, 1889, duly sold by me in the manner provided by law for the delinquent taxes thereon for the year 1888, amounting to thirty and .02 dollars, including interest and penalty thereon and the costs allowed by law to A. D. Stephens for the sum of thirty and $\frac{2}{100}$ dollars, he being the highest and best bidder for the same; and I further certify that unless redemption is made of said real estate in the manner provided by law the said A. D. Stephens or assigns will be entitled to a deed therefor on and after the 4th day of November, A. D. 1889.

"'O. K. ULSAKER,
"'*County Treasurer,*
"'By SIDNEY E. DE LONG, *D'p'ty.*'

"That the other certificates so executed and delivered were in the same form save as to the description of the lands and amounts paid and names of the purchaser-.

"That the certificates made to said S. H. Snyder were before the beginning of said suit transferred to said Alford and said Gates.

"They admit that there was no redemption from said sales, and that said certificates were afterwards presented for deeds, and deeds were executed substantially as set forth in said bill.

"They admit that said deeds have not been recorded, and they show that one of the said deeds was in the words and figures following:

"'Whereas Lore Alford and John C. Gates did on the 12th day of February, A. D. 1892, produce to the undersigned J. A. Rickert,

treasurer of the county of Richland, in the State of North Dakota, a certificate of purchase in writing bearing the date the 4th day of November, 1889 signed by O. K. Ulsaker who at the last-mentioned date was treasurer of said county from which it appears
34 that S. H. Snyder did on the 4th day of November 1889 purchase at public auction at the door of the court-house in said county, the tract parcel, or lot of land lastly in this instrument described, and which lot was sold to S. H. Snyder for the sum of seventeen and $\frac{52}{100}$ dollars being the amount due on the following tract or lot of land returned delinquent for the non-payment of taxes, costs, and charges for the year 1888, to wit: the southwest one-quarter of section number thirty-three in township number one hundred and thirty-six, north of range number fifty-one west of the fifth principal meridian containing one hundred and sixty acres more or less according to the Government survey. And whereas the said certificate of purchase has been assigned to Lore Alford and John Gates and it appearing that the said Lore Alford and John C. Gates are the legal owners of said certificate of purchase etc.

"'And it appearing that the said Lore Alford and John C. Gates assignees are the legal owners of said certificate of purchase, and the time fixed by law for redeeming the land therein described having now expired and the same not having been redeemed as provided by law and the said Lore Alford and John C. Gates having demanded a deed for the tract of land mentioned in said certificate and which was the least quantity of the tract above described that would sell for the amount due thereon for taxes, costs and charges as above specified; and it appearing that the said lands were legally liable for taxation and had been duly assessed and properly charged on the tax book or duplicate for the year 1888, and that said lands had been legally advertised for sale for taxes were sold on the 4th day of November, 1889.

"'Now therefore, this indenture made this 12th day of February, 1892 between the State of North Dakota by J. K. Rickert, the treasurer of said county of the first part, and the said Lore Alford and John C. Gates of the second part, witnesseth, that the said party of the first part, for and in consideration of the premises and the sum of one dollar in hand paid hath granted, bargained, and sold, and by these presents doth grant, bargain, sell, and convey unto the said party of the second part, their heirs and assigns forever, the tract or parcel of land mentioned in said certificate and described as follows, to wit, the southwest one-quarter of section number thirty-three in township number one hundred and thirty-six, north
35 of range number fifty-one, west of the fifth P. M. containing one hundred and sixty acres more or less according to the Government survey, to have and to hold said mentioned tract or parcel of land, with the appurtenances thereunto belonging, to the said party of the second part, their heirs and assigns forever, in as full and ample manner as the said treasurer of said county is empowered by law to sell the same.

"'In testimony whereof, the said J. K. Rickert, treasurer of said

Richland county, has hereunto set his hand and seal on the day and year aforesaid.

"'J. K. RICKERT,
"'*County Treas.*

"'Attest: CHAS. G. BADE,
"'*Auditor of Richland Co., N. Dak.*

"'STATE OF NORTH DAKOTA, }
County of Richland. }

"'I, A. E. Sunderhauf, a notary public in and for said county, do hereby certify that on this 30th day of April, 1892, personally came before me J. A. Rickert, treasurer of Richland county, to me well known as the same person described in and who executed the foregoing deed, and acknowledged that he executed the same, as treasurer of Richland county, freely and voluntarily and for the uses and purposes therein contained.

"'[NOTARIAL SEAL.] A. E. SUNDERHAUF,
"'*Notary Public in and for Richland Co., N. Dak.*'

"That the other deeds were in the same form substantially, save that the description of the lands, the name of the purchaser, and the amounts paid were different in the different deeds.

"They admit that it does appear from the records in the office of the county treasurer of said county that such deeds and tax certificates were executed and delivered, and that the defendants' grantees under said deeds do claim and assert an interest thereunder to the lands described in said deeds and intend to record said deeds, and that the holders of said certificates do claim a lien on the
36 lands described therein for the amount of the purchase price, with interest, and claim an interest in and to said land by virtue of said tax sale.

"Further answering, these defendants severally say that they deny that the several county and township assessors for said county did not in the year 1888 make out and deliver to the county clerk of said county assessment-rolls prepared in substantially the form prescribed by the Compiled Laws of Dakota Territory for 1887.

"They deny that the said assessors failed to assess in said year the lands described in said bill, and deny that said lands or any of them were omitted from the township and county assessment-rolls for the said county for that year. They deny that the lands or the description of them do not appear on said roll.

"They deny that the board of county commissioners of said county of Richland did not hold a session of two days, commencing with the first Monday in July, 1888, as a board of equalization for the purpose of equalizing and correcting the assessment roll for said county.

"They deny that the levy for the general territorial tax for said year upon said lands exceeded the amount authorized by law, and aver that the rate of said territorial levy was fixed by the territorial board of equalization under and in pursuance of the powers given to said board by law.

"They admit that said lands so claimed by each of these defendants is of the value of over $2,000, and that the cost of redemption from the tax certificates held by each of these defendants would be more than $2,000 respectively.

"And these defendants submit that said bill ought to be dismissed with costs.

"Dated Jamestown, July 2nd, 1895.

"EDGAR W. CAMP,
"*Solicitor for Defendants.*"

37 Thereafter, a replication having been duly filed, the case was submitted to the circuit court of the United States for the district of North Dakota for final hearing and decision upon the following stipulation of counsel, to wit:

"*Stipulation.*

"It is hereby stipulated by and between the parties hereto and their counsel that, as between said parties and for the purposes of this trial, the following facts shall be deemed and taken to be true, and, together with the admissions in the pleadings, shall constitute the evidence upon which the above-entitled cause shall be tried and determined:

I.

"That the copies of the assessment-rolls for the townships of Helendale, Colfax, Barrie, Sheyenne, West End Freeman, Abercrombie, Grafton, West End Mellon, and Walcott, marked, respectively, Exhibits 'A,' 'B,' 'C,' 'D,' 'E,' 'F,' 'G,' 'H,' and 'I,' hereunto attached, are true copies of the respective assessment-rolls for said townships, in said county of Richland, for the year 1888, in so far as such assessment-rolls relate to the lands described in said exhibits.

II.

"That Exhibit 'J,' hereunto annexed, is a true and correct copy of the official minutes of the proceedings of the county commissioners of Richland county, North Dakota, from July 2 to July 10th, inclusive.

III.

"That the copy of the proceedings of the board of county commissioners for said county of Richland for September 3, 1888, hereunto attached and marked Exhibit 'K,' is a true and correct copy of the official minutes of said board at said meeting.

IV.

"That Exhibit 'L,' hereunto attached, is a true and correct copy of the form of tax-list of said county of Richland for the year 1888, and that the rate of the tax levy for 'territorial fund' for said year, as shown by said tax-list, was three and one-tenth (3.1)
38 mills, as shown on said exhibit.

"That Exhibit 'M,' hereunto annexed, is a true and cor-

rect copy of the proceedings of the territorial board of equalization had on August 13, 1888, so far as the same relate to Richland county.

"(Signed) F. M. DUDLEY,
"(Signed) J. B. McNAMEE,
"Attorney- for Plaintiffs.
"(Signed) EDGAR W. CAMP,
"Attorney for Defendants."

And the said United States circuit court of appeals for the eighth circuit further certifies to the Supreme Court of the United States the following questions or propositions of law arising upon the record in said case, concerning which it desires the instruction of that court for its proper decision of said cause:

Questions:

1. Had the United States circuit court for the district of North Dakota jurisdiction to hear and decide said case?

2. Were or were not the lands described in the bill of complaint subject to taxation under the laws of the Territory of Dakota in the year 1888 by reason of the facts stated in the bill of complaint respecting the condition of the title thereof?

3. Was it the purpose of chapter 99 of the Laws of Dakota for 1883 to exempt from taxation lands granted to aid in the construction of the Northern Pacific railroad by the act of July 2, 1864, which are outside of its right of way and are not shown to be used in its business as a common carrier?

4. If such was the purpose of the act was the act void in whole or in part as transgressing the limitations placed upon the power of the territorial legislature?

5. Conceding that the purpose of chapter 99 of the Laws of 1883 was to exempt, among other things, the land grant of the Northern Pacific Railroad Company, and that said law is valid, are the
39 payments of the percentage of the gross earnings for the year 1888, alleged in the bill to have been made, sufficient to entitle the complainant to the equitable relief sought?

6. Conceding the lands in controversy to have been subject to taxation for the year 1888, were the appellants, by reason of any of the alleged irregularities or defects in the mode of assessment, entitled to equitable relief without first offering to pay the taxes properly chargeable against said lands?

In witness whereof the undersigned judges holding the said United States circuit court of appeals for the eighth circuit have hereunto set their hands this 17th day of February, A. D. 1896, at St. Louis, Missouri, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals, and by the clerk of said court duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

40 United States Circuit Court of Appeals for the Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Edwin H. McHenry and Frank G. Bigelow, receivers of the property of the Northern Pacific Railroad Company, appellants, *vs.* Lore Alford *et al.*, No. 748, December term, 1895, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this 17th day of February, A. D. 1896.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] Original. U. S. circuit court of appeals, eighth circuit, December term, 1895. No. 748. Edwin H. McHenry *et al.*, receivers, etc., appellants, *vs.* Lore Alford *et al.* Certificate of questions to the Supreme Court of the United States. Filed Feb. 17, 1896. John D. Jordan, clerk.

Endorsed on cover: Case No. 16,205. U. S. circuit court of appeals, eighth circuit. Term No., 139. Edwin H. McHenry & Frank G. Bigelow, as receivers of the property of the Northern Pacific Railroad Company, appellants, *vs.* Lore Alford, J. C. Gates, A. D. Stephens, Sumner R. Clarke, and D. C. Lake. Filed February 27, 1896.

No. 139.
Brief of Bunn for Appts.

NOV 26 189
JAMES H. McKENNEY
CLE

Filed Nov. 26, 1897.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

No. 139.

EDWIN H. McHENRY AND FRANK G. BIGELOW, AS RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, *Appellants*,

vs.

LORE ALFORD, J. C. GATES, A. D. STEPHENS, SUMNER R. CLARKE AND D. C. LAKE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

C. W. BUNN,

Of Counsel.

ABBOTT PRINTING COMPANY, BOOK AND JOB PRINTERS,
91-94 UNION BLOCK, ST. PAUL.

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

No. 139.

DWIN H. McHENRY AND FRANK G. BIGELOW, AS RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, *Appellants*,

vs.

ORE ALFORD, J. C. GATES, A. D. STEPHENS, SUMNER R. CLARKE AND D. C. LAKE.

A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF FACTS.

The Circuit Court of Appeals certifies that upon the cord of this suit pending in that court there arise the lowing questions, to-wit:

1. Had the United States Circuit Court for the District of North Dakota jurisdiction to hear and decide said case?

2. Were or were not the lands described in the bill of complaint subject to taxation under the laws of the Territory of Dakota in the year 1888 by reason of the facts stated in the bill of complaints respecting the condition of the title thereof?

3. Was it the purpose of chapter 99 of the Laws of Dakota for 1883 to exempt from taxation lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way and are not shown to be used in its business as a common carrier?

4. If such was the purpose of the act, was the act void in whole or in part as transgressing the limitations placed upon the power of the territorial legislature?

5. Conceding that the purpose of chapter 99 of the laws of 1883 was to exempt, among other things, the land grant of the Northern Pacific Railroad Company, and that said law is valid, are the payments of the percentage of the gross earnings for the year 1888, alleged in the bill to have been made, sufficient to entitle the complainants to the equitable relief sought?

6. Conceding the lands in controversy to have been subject to taxation for the year 1888, were the appellants, by reason of any of the alleged irregularities or defects in the mode of assessment, entitled to equitable relief without first offering to pay the taxes properly chargeable against said lands?

—Transcript, p. 29.

For the sake of brevity we will endeavor to condense the court's certificate, as follows:

Upon the record on file in the said Circuit Court of Appeals in this case, now pending before said court upon an appeal duly taken from a decree rendered by the United States Circuit Court for the District of North Dakota, dismissing the complainants' bill of complaint, the following facts appear, to-wit:

That on March 22, 1894, Oakes, Payne and Rouse, as Receivers of the Northern Pacific Railroad Company, in whose place the present complainants have been substituted, filed a bill of complaint in the District Court of Richland County, State of North Dakota, against J. A. Rickert and other defendants named in the certificate, A. D. Stephens, Sumner R. Clarke, D. E. Lake, Lore Alford and S. H. Snider, among others; said bill contained no allegations showing residence or citizenship of any of the above named complainants or defendants; it contained in substance the same allegations set out in the amended bill subsequently filed, and prayed for substantially the same relief as the amended bill.

That on September 5, 1894, Sumner R. Clarke, one of the defendants named in said bill, appeared for the first time in said District Court for Rich-

land County, North Dakota, and filed a petition, duly verified and accompanied by a good and sufficient removal bond, to remove said suit, praying for the removal thereof into the Circuit Court of the United States for North Dakota; whereupon, on the fifth day of September, 1894, the said court granted said petition and made an order for the removal of the suit as prayed.

The petition for removal is set forth in full in the court's certificate; it alleges and shows that there was in said suit a controversy wholly between citizens of different states which could be fully determined as between them, to-wit: a controversy between the complainants as receivers of the property of the Northern Pacific Railroad Company on one hand and the petitioner on the other hand; that Oakes was a citizen of New York, Payne a citizen of Wisconsin, and Rouse a citizen of Ohio, the petitioner a citizen of Illinois; that J. A. Rickert and Charles J. Bade and the County of Richland were residents and citizens of the State of North Dakota; that the controversy consisted in this: that the petitioner for removal, in November, 1889, bought at the sale of taxes in Richland County, for delinquent taxes for the year 1888, certain of the lands described in the bill of complaint, for which he received certificates, and that the lands not being redeemed from sale, the petitioner for removal received tax deeds therefor, which, the petitioner claimed and insisted, conveyed to him a good title; the petitioner attached to the petition a schedule of the lands so purchased by him, which were a part of the lands described in the complaint, and the petition showed that the amount paid by the petitioner for said tax titles was in excess of $2,000.00; that in the suit the complaint sought to avoid and set aside said tax proceedings and deeds; that none of the other parties defendant were interested in the lands so bought by the petitioner; that Rickert and Bade were officers of the County of Richland, and that the county and said officers had no interest in the controversy, having received from the petitioner the tax assessed by it; that the value of the lands claimed by the petitioner under said deeds was more than $5,000.00.

That after the removal of the suit into the Circuit Court, to-wit, July 1, 1895, the complainants filed an amended bill of complaint against the defendants

Lore Alford, J. C. Gates, A. D. Stephens, Sumner R. Clarke, D. C. Lake, without dismissing the original bill of complaint as against the other defendants named therein.

The court's certificate sets out the amended bill of complaint in full (except as to exhibits).

It appears from said amended bill that the complainants were receivers of the Northern Pacific Railroad Company, which was a corporation created, organized and existing under the act of Congress approved July 2, 1864, and they were appointed by and under decrees of the Circuit Court of the United States. The bill sets forth various provisions of the said federal charter, not necessary to repeat in this statement, the acceptance of said charter by the railroad company, the definite fixing of the company's line of road past the lands in question prior to May 26, 1873, and the filing of a plat thereof with the Commissioner of the General Land Office; also the construction of the road, and that the lands described in the bill were odd sections, co-terminus with said portion of the road, and within forty miles thereof; that when the line was so definitely fixed the lands were not reserved, sold, granted, or otherwise appropriated, and there were no filings or entries, or applications to make filings or entries of any nature whatsoever against said lands in the land office; that the lands were reported by the government surveyors to be agricultural and not mineral.

That long prior to the attempted assessment by Richland County, in 1888, the railroad company had duly claimed said lands before the land department as coming to it under its grant, and had paid to the department the necessary fees; that the land department, in 1888, had not patented any of said lands to the company, but was engaged in considering questions necessary to be decided under the company's charter, in order to determine whether the lands came to the company or not; questions as to whether said lands were mineral or non-mineral, and as to whether the same had been sold, reserved, or otherwise appropriated, and as to whether pre-emption or other claims had attached thereto prior to the definite location of the road; that said determination of said questions of fact had not been made by the land department in the year 1888; that a portion of the lands referred to in the bill of complaint (de-

scribed in one schedule attached to the bill) were patented to the railroad company in 1892 and 1894, and a portion of the lands (described in another schedule attached to the bill) were yet unpatented.

That the lands had not been segregated from the public lands of the United States at the time of the tax assessment; that when the matter should be finally decided by the land department, it would be determined that a part of said unpatented lands was mineral, or not free from pre-emption or other claims or rights at the date of the grant, or at the time the line of railroad was so definitely fixed, while others of said lands would be held by the land department to fall within the grant; that the complainants did not know, could not ascertain and were unable to show, upon information or otherwise, what particular tracts or parcels would be held to fall within the grant, and what particular tracts or parcels still belonged to the United States; that the delay in determination of the status of said lands by the land department was not due to the action of complainants or the railroad company, who had at all times endeavored to secure patents therefor, and had done everything within their power to obtain an identification and segregation of such lands and the issuing of patents.

The first proposition made by said bill and based upon the allegations last referred to was, that the lands in 1888 were untaxable because of the said condition of the title thereof.

The bill then sets up the execution of certain mortgages by the railroad company and the bringing of certain suits, one of them for foreclosure of said mortgages, in which suits the complainants were appointed receivers by the proper Circuit Courts of the United States, and that the said lands were in the possession and control of the complainants as such receivers; the bill further pleads an act of the Territory of Dakota, approved March 9, 1883 (which act is printed in appendix hereto). Briefly stated, the provision of such act is that all railroad companies shall be exempt from all other taxation upon their property in North Dakota, in consideration of paying into the state treasury an annual percentage upon gross earnings.

The bill further pleads an act of the Territory of Dakota, approved March 7, 1889, (which act is also printed in appendix hereto). For present pur-

poses it is sufficient to say that said act provided for exemption of railroad property in 1889 and subsequent years in consideration of payment of a percentage on gross earnings. The bill then sets forth that the Northern Pacific Railroad Company, prior to and during the years 1886, 1887, 1888 and 1889, operated a railroad in said territory; that it did, within thirty days after the passage of said act of March 7, 1889, accept its provisions and became subject thereto according to its terms, and within thirty days after the passage of the same filed with the treasurer of the territory an account of the gross earnings of said company, both local and interstate, for the years 1886, 1887 and 1888, and paid into the treasury of the territory the entire amount of tax and interest thereon claimed by the territory on local and interstate earnings remaining unpaid at the time of filing said accounts, such payments being as follows: For 1886, $38,095.31; for 1887, $65,585,46; and the company further paid into the state treasury at the same time, in accordance with the provisions of the act of 1883, the further sum of $46,937.09, being one-half the entire amount claimed by the territory as due from the company for the year 1888; and further, on or about August 15, 1889, the company paid into the territorial treasury the further sum of $46,937.09, being the remaining one-half of the sum claimed as taxes by the territory under the gross earnings law, for the year 1888.

The bill then sets forth certain alleged irregularities in the assessment in Richland County for 1888, which the bill claimed rendered the said assessment, as well as titles issued thereon, void. It is not necessary to state this portion of the bill, inasmuch as the effect of said irregularities is not certified to this court; the only question touching this part of the case which is certified is whether the complainants can avail themselves in this suit of such irregularities without first offering to pay the taxes properly chargeable against said lands, and this question is based on the assumption that the lands be first determined to be taxable.

The bill further alleges the levy of the tax for the year 1888 upon said lands by the county auditor of Richland County, the placing of said lands on the tax list and the sale of the same for said taxes. The bill refers to schedules attached which

show what portion of the lands described in the bill of complaint were sold to each of the defendants, it being alleged that those purchased by S. H. Snider were assigned by him to the defendants Lore Alford and J. C. Gates (this is obviously the reason why the amended bill drops Snider as one of the defendants and adds Gates, who was not defendant in the original bill).

The bill seeks to set aside said tax titles and deeds as a cloud on title, and prays for a decree that said tax titles be declared illegal, and that the lands described in the bill be decreed to be free from assessment and taxation in said county for the year 1888; that the title and claim of the defendants be adjudged to be void, and their certificates and deeds to be a cloud on the title, and that they be required to deliver up the same for cancellation, and for other relief.

The said defendants, Alford, Gates, Stephens, Clarke and Lake, joined in a demurrer and answer to said amended bill. This demurrer and answer is set forth *in extenso* in the certificate. It is sufficient for present purposes to say that the defendants demurred to the bill, so far as related to those allegations thereof above stated and tending to show that the lands were exempt from taxation, but answered the bill as to the alleged irregularities.

ARGUMENT.

I.

A preliminary question arises as to whether all or any of the questions are so certified as to give this court jurisdiction. It will be noted that the whole amended bill (with omissions of matters immaterial) is certified, together with the petition on which the suit was removed to the United States Court, and the defendants' demurrer and answer; but these papers are not sent up *as* the record in the case below, or a part of it, but are a part of the court's certificate. Doubtless the certificate might have been briefer—more condensed—but its unnecessary verbiage or length (if it be chargeable with that fault) does not make it a bad certificate.

The certificate states the facts on which the questions arise and the whole record is not sent up. The certificate states that the suit is pending in the Circuit Court of Appeals, and that the questions certified arise upon the record.

It was held in *Maynard* vs. *Hecht*, 151 U. S., 324, that the decisions and rules settled as to certificates from the Circuit Court, under sections 650, 652 and 693 of the Revised Statutes, are applicable to certificates from the Circuit Court of Appeals under the act of 1891. 26 Stat. 826, 828.

In *Jewell* vs. *Knight*, 123 U. S., 426, where the previous authorities were examined and fully cited in the opinion of Mr. Justice Gray, the following rules were laid down: 1. The points certified must be of law only and not questions of fact, or mixed law and fact; not such as to involve or imply conclusions or judgment by this court upon the weight or effect of testimony or facts adduced in the cause. 2. The whole case, even when its decision turns upon matter of law only, cannot be sent up by certificate. As throwing light on these rules the Court said of the certificate in that case, p. 434:

> "The statement (embodied in the certificate and occupying three closely printed pages in the record) of what the judges below call 'the facts found' is in truth a narrative in detail of various circumstances as to the debtor's pecuniary condition, his dealings with the parties to this suit and with other persons, and the extent of the preferred creditors' knowledge of his condition and dealings. It is not a statement of ultimate facts, leaving nothing but a conclusion of law to be drawn; but it is a statement of particular facts, in the nature of matters of evidence, upon which no decision can be made without inferring a fact which is not found.
>
> "The main issue in the case, upon which its decision must turn, and which the certificate attempts in various forms to refer to the determination of this court, is whether the sale of goods was fraudulent as against the plaintiffs. That is not a pure question of law, but a question either of fact or of mixed law and fact."

Again the Court said, p. 435:

> "Not one of the questions certified presents a distinct point of law; and each of them, either in express terms or by necessary implication, involves in its decision a consideration of all the circumstances of the case. The first question, whether the six week's delay in taking judgment upon the warrant of attorney made the subsequent sale voidable by the plaintiffs, as well as the second question, whether evidence of the debtor's fraudulent intent and of the preferred creditors knowledge of that intent was requisite to render 'said sale' void as against the plaintiffs, could not be determined except upon a view of all the attendant circumstances. The third question, whether 'such sale,' if fraudulent, would be voidable in favor of the whole or of part only of the plaintiff's debts, could not arise until the sale had been decided to be fraudulent. The fourth and fifth questions frankly submit in two subdivisions the general question whether 'under the circumstances' the sale was fraudulent as against the plaintiffs."

In *Graver* vs. *Faurot*, 162 U. S., 435, the same rules were again laid down and applied to the certificate in that case. The court below had in effect certified to this court whether the facts of that suit brought it under *United States* vs. *Throckmorton*, 98 U. S., 61, or *Marshall* vs. *Holmes*, 141 U. S., 589. As was said by the Chief Justice on page 437:

> "In any view we should be compelled, in answering, to analyze the facts charged * * * to determine whether the facts set up here fall within the same category and direct which decision should govern." See, also, *Cross* vs. *Evans*, 167 U. S., 60.

But this court will not decline to pass on a question of law properly certified, because other questions are also sent up of which the court will not take jurisdiction. *Fire Insurance Association* vs. *Wickham*, 128 U. S., 426. In that case it was held that the question, whether parol evidence might be given to explain the documents offered in evidence by defendant and set forth in the certificate, gave this court jurisdiction.

Applying these principles to this case it will be found, we think, that some of the questions certified are prop-

erly here, while some cannot be considered. "Had the United States Circuit Court for the District of North Dakota jurisdiction to hear and decide said case?" is the first question certified. This depends on the sufficiency of the removal to that court from the state court. We are confident this question cannot be considered. It is not a simple question such as that certified and decided in *Hooe* vs. *Jamieson*, 166 U. S., 395, where the question was "whether or not said complaint sets forth any cause of action, *in which there is a controversy between citizens of different states*, so as to give said circuit court jurisdiction thereof." The clause italicised points the distinction between that question and the one here. Here we are at a loss for the question suggested concerning the jurisdiction. The parties had raised none. One of the defendants removed and the circuit court decreed for the defendants. The plaintiffs do not question the jurisdiction. How can it be determined whether the point goes to the form of the petition, the time of its filing, to its allegations as to jurisdictional amount, or as to whether there was a severable controversy in the suit entitling one defendant to remove, or as to whether such removal would bring with it the whole suit, or as to whether the requisite citizenship was shown in the record? Not only are a multitude of questions submitted in this one inquiry, but this court, to answer them, would need the whole record, would have to examine all its allegations and inferences, and might have to apply almost any one of the multitude of established rules and precedents on the whole subject of removal of causes.

The second question certified is, "Were or were not the lands described in the bill of complaint subject to taxation under the laws of the Territory of Dakota in the year 1888, by reason of the facts stated in the bill of complaint respecting the condition of the title thereof?" It is equally clear, we submit, that this question is not properly before the court. The point aimed at is whether the allegations of the complaint show such a condition of the title as make the property subject to taxation under the laws of the Territory of Dakota. Now, to answer this question, this court would have to first examine the

complaint so far as it related to this subject, construe its allegations, draw the proper inferences and therefrom arrive at the true facts of the case. The lower court has simply recited to this court the allegations of the complaint. It is similar, we submit, to a case where the lower court states to this court the testimony given on the trial. This court would not examine the testimony and draw the necessary conclusions therefrom to determine what were the ultimate facts, even although the testimony was given all by one witness. See cases before cited. Next, this court would have to decide whether there was any principle of general law of the United States applicable in territories, or any express legislation of Congress as to the Northern Pacific Railroad Company lands, or any express legislation of Congress as to the Territory of Dakota, or any legislation or principle of the territorial law in Dakota which would subject these lands to taxation or render them exempt. This question attempts to send this whole branch of this case to this court for trial and determination as a court of original jurisdiction.

The third question is this: "Was it the purpose of chapter 99 of the Laws of Dakota for 1883 to exempt from taxation lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way and are not shown to be used in its business as a common carrier?" This question, we submit, presents a single, clear and distinct question of law within the jurisdiction of this court, to-wit: whether chapter 99 of the Laws of Dakota for 1883 should be so construed, as to exempt from taxation lands granted to the Northern Pacific by Congress, which were outside of its right of way and not used for railroad purposes.

The fourth question certified is this: "If such was the purpose of the act, was the act void in whole or in part as transgressing the limitations placed upon the power of the territorial legislature?" This also, we submit, is one single and clear question of law which can be considered and decided without reference to any other part of the case and without an examination of the record,

and it comes within that class of certified questions which confers jurisdiction upon this court.

The fifth question is this: "Conceding that the purpose of chapter 99 of the laws of 1883 was to exempt, among other things, the land grant of the Northern Pacific Railroad Company, and that said law is valid, are the payments of the percentage of the gross earnings for the year 1888, alleged in the bill to have been made, sufficient to entitle the complainants to the equitable relief sought?" This question also, it seems to us, comes within the category of questions which this court will answer upon certificate.

The sixth question is this: "Conceding the lands in controversy to have been subject to taxation for the year 1888, were the appellants, by reason of any of the alleged irregularities or defects in the mode of assessment, entitled to equitable relief without first offering to pay the taxes properly chargeable against said lands?" This is a question, as it seems to us, not properly before this court. In order to answer it the court must examine that part of the record relating to irregularities, several pages in extent, the irregularities alleged being several. It must construe the allegations of the complaint and draw the proper inferences therefrom. It must consider and apply all the laws of Dakota Territory relating to assessments; it must decide what consideration and weight should be given to the allegations of the complaint showing that the property of other railroad companies was not put upon the tax roll for 1888; it must decide whether, under the laws of Dakota Territory, the defects and irregularities alleged go so far to the groundwork of the tax as to make it absolutely null and void, and must consider the further question whether it is possible for the complainants or the court to ascertain what taxes would be properly chargeable against the lands.

II.

But if the question of jurisdiction of the circuit court is properly before this court on the certificate, we submit that the circuit court had jurisdiction.

The record does not contain the bill filed originally in the state court, but the certificate to this court states (transcript, p. 1) that the same contained no allegations showing the residence or citizenship of any of the complainants or defendants, but that it did contain, in substance, the same allegations as the amended bill, which is set forth at length in the certificate. The bill, therefore, showed that it was brought by federal court receivers of a federal corporation. It was therefore a case of which the circuit court would have had jurisdiction independent of citizenship of the parties. The case involved a federal question and was within the jurisdiction of the circuit court, because of its subject matter, but the petition for removal alleged and relied on adverse citizenship as the ground of removal. The suit was removed by one of the defendants under section 2 of the act of August 13, 1888 (25 Stat. 434). The first clause of the act which provides for removals on the ground of subject matter, gives the *defendants* a right to remove. Under this clause it is not questioned that *all the defendants* must join in the petition. It has been the construction of all the removal acts that the word "defendant" or "defendants" is construed to mean the "party defendant;" that is, all the defendants. Therefore the case was not properly removed to the circuit court on the ground of subject matter.

The next clause gives *all the defendants non-residents of the state* a right to remove on the ground of citizenship. The petition for removal did not bring the case under this clause.

The removal must rest upon the third clause of the statute, which says: "*And when in any suit mentioned in this section* there shall be a controversy wnich is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit," etc. This clause is general and applies *to all suits mentioned in the section;* this must include those mentioned in the first clause or subdivision, which involve federal questions and would be removable on the ground of subject matter on petition of all the defendants. But under the third clause or sub-

division *part of the defendants* may remove the same suits. The subdivision must be held to apply to all the suits mentioned in the section, giving the language of Congress its reasonable and literal effect. Moreover, there would appear no reason why right to remove to a federal court for citizenship should not exist *because* the suit involves also a federal question, which, of all other questions, is peculiarly for the federal court.

Removal under this subdivision takes the entire suit, (*Barney* vs. *Latham*, 103 U. S., 205,) and there would appear to be no doubt that this suit involves a severable controversy. It is a suit including a large amount of land in which the railroad company claimed an interest, brought against a number of defendants who had tax titles, each defendant holding, as shown by the bill, distinct and separate deeds on different lands. The suit related entirely to the tax of 1888, sold in 1889, and the bill showed what lands were bought off at that sale by each one of the defendants. No one defendant had the slightest interest in the land claimed by another defendant. Whether they could be joined in one suit in equity is not now before the court, but assuming that they could be joined, each defendant must of necessity have a separate trial and decision—not necessarily a trial separate as to time and form, but in substance separate, because each defendant claims different and distinct land. The controversy in such a case comes within the language of the act, and is wholly between the plaintiff and each defendant, and can be fully determined as between them without the presence of any other defendant. No one defendant has, either directly or remotely, any interest in any decree the court may make as to any other defendant, except as such decree may establish a legal precedent. The case comes within the decision in *Barney* vs. *Latham*. See language of Mr. Justice Harlan, pp. 213-214-215. The test of jurisdiction was well and sufficiently stated by Mr. Chief Justice Waite in delivering the opinion of the court in *Fraser* vs. *Jennison*, 106 U. S., 191.

> "To entitle a party to a removal under the second clause of the second section of the act (of 1875), there must exist in the suit a separate and

distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and citizens of the other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun." See, also, *Mitchell* vs. *Smale*, 140 U. S., 406; *Merchants' Cotton Press & S. Co.* vs. *Insurance Co.*, 151 U. S., 368.

In this case the petition showed the proper citizenship, to-wit, the three complainants being citizens, one of New York, one of Ohio, one of Wisconsin, and the removing defendant a citizen of Illinois. It is now well settled by the decisions of this court that a citizen of Illinois, being sued in a state court in North Dakota by a citizen of New York, can remove the suit to the federal court. Such a suit is one of which the circuit court has jurisdiction under the first section of the act of August, 1888. It is hardly necessary to call attention to the fact that this act does not change the language of the separable controversy subdivision of the act of 1875, except that it takes away the right to remove from the plaintiff. The decisions, therefore, under the act of 1875, are good authority under the present law.

The County of Richland and officers of the county, who were joined as defendants in the bill filed in the state court, were at most merely formal and unnecessary parties. It is doubtful if they were even proper parties, for they had issued the tax titles and received the tax, *had no interest in the controversy* and no relief appears to be prayed against them in the bill. Their citizenship, is therefore, immaterial.

There is a question of practice, suggested rather than stated, in the certificate, to-wit: whether the amended bill was properly filed in the circuit court after the removal, against a part of the defendants named in the original bill, without dismissal of the original bill as to such omitted

defendants. It is hardly necessary to suggest that this question of practice ought not to be dignified by treating it as being material to the jurisdiction of the court. Its answer either one way or the other does not affect the jurisdiction. Even if the practice was improper, and if the circuit court acted irregularly in entertaining the amended bill and entering a decree thereon, the only remedy is by appeal.

III.

Believing it clear that the court will not consider the second question certified, we pass to the third. Was it the purpose of Chapter 99, Laws of Dakota for 1883, to exempt these lands in consideration of the gross earnings tax? Or, in other words, was the percentage on gross earnings levied in lieu of all other taxes on the land grant lands (as well as on the railroad of the company)?

The answer to this question must depend on a fair reading of the act. The act is not doubtful in meaning. It says, sec. 1:

> "In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances or appendages thereof, or *upon any other property situated in this territory, belonging to the corporation owning or operating such railroads*, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid, etc., (a percentage as specified of the gross earnings of operating the railroad)."

Again the act in the same section says:

> "And the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessments whatever upon the property aforesaid."

The same section makes such percentage

> "a lien upon the railroad of said company and upon all property, estate and effects of said company whatsoever, personal, real or mixed."

The act, sec. 5, says:

> "The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are

sold, leased, or contracted to be sold or leased; and on or before the first day of April of each year each railroad company having lands within this territory shall return to the county clerk of each county full and complete lists, verified by the affidavits of some officer of the company having knowledge of the facts, of all lands of such company situated in such county, sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A. D., 1883, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, or contracted to be sold or leased, prior to the last day of Dece ber, A. D. 1882."

This act had n preceded by an act (Session Laws Territory of Dak 1879, c. 46. p. 122) providing for a gross earnings tax—

> "in lieu of all other taxation * * * of the roadbed, right of way, station or depot grounds, tracks, rolling stock, water stations," etc., etc., "*used in or incident to the operation of such railroad.*"

The act of 1879 provided for the taxation of all other property of railroad companies like that of individuals. If anything were needed to make it more clear that the act of 1883 was intended to cover these lands (for this intent is about as clear as words could make it), it is the deliberate and marked change in language from the act of 1879 to that of 1883.

The act of 1883 specifically enumerates the railroad, its equipment, appurtenances, or appendages, its capital stock and business transactions, and adds "or upon any other property situated in this territory." The specific words cover all property used in the operation of the railroad and the general words cannot be wholly rejected.

Moreover, section 5 must be wholly eliminated from the act in order to say that the act does not apply to the lands.

It is important to bear in mind that when the act of 1883 was passed the Northern Pacific land grant, eighty miles in width, extending over four hundred miles in length through the territory from one end to the other including many of its best lands, must have occupied a

foremost place in the mind of the legislature. It cannot be conceived that the legislature intended, in the act of 1883, to ignore the question of taxing this land, or to make any uncertain provision on the subject.

This question was elaborately argued, and was decided in 1892, in the state court of North Dakota, which state succeeded the territory as the public body entitled to these unpaid taxes. The decision in favor of our contention has never been questioned on this point by any subsequent decision and should, we submit, control here. The case is hardly distinguishable from that of a state court construing a statute of the state.

The act was also undoubtedly modeled after the policy and legislation of the adjoining and older state, Minnesota, where, from the admission of the state in 1857, railroads had paid a similar gross earnings tax, the immunity extending to granted lands. And in that state it was before 1883 the settled law that such laws did not provide an *exemption*, but a special system of taxation and were to be liberally construed. *City of St. Paul* vs. *St. Paul & Sioux City Ry. Co.*, 23 Minn., 471; *State* vs. *N. P. R. R. Co.*, 32 Minn., 298, 299; *State ex rel. Marr* vs. *Luther*, 56 Minn., 156.

IV.

(a) The most important question is the fourth: whether the gross earnings law of 1883 was void as transgressing the limitations placed on the power of the territorial legislature. These limitations were of course in the act of Congress organizing the territory. The only provision of this act, we believe, relied on to avoid the statute, is section 6 of the organic act. 12 Stat., p. 241; Rev. Stat. U. S., sec. 1925.

> "And be it further enacted, that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property

of residents; nor shall any law be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

As we understand, the grounds of objection to the validity of the act of 1883 amount to this: that a railroad company, in respect to a land grant, is in precisely the same condition as any other owner of real estate; and therefore classification, which provides a special method of taxation as to them, is arbitrary and unwarrantable, and amounts to a discrimination prohibited by section 6 of the organic act.

But it is elementary, as said by Chief Justice Marshall, in *McCulloch* vs. *Maryland*, 4 Wheat., 415, that the power to tax is an absolute power, which acknowledges no other limits than those expressly provided in the constitution, and it may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. Taxation is a branch of legislative power and ordinarily a legislature has the perfect right to make exemptions, or to classify property, to determine what property shall bear the burden of taxation, and to tax one class of property by one rule, another class of property by a different rule. The only limitation upon this power is that expressly or by necessary implication imposed in the organic act.

What are then the limitations imposed by said organic act? The provision is obviously a limitation, but not we think of the kind contended for. There are two essential elements in the imposition of every tax; first, selection of the object which shall pay the tax; second, fixing the rule according to which it shall be apportioned. Both these questions were within the power of the territorial legislature, except so far as limited by said section 6, organic law. It certainly cannot be doubted that the section did not limit the legislative power in respect to selecting the subjects of taxation. If it did, then it would have prevented the legislature from making any exceptions from taxation whatsoever, and have made it incumbent upon that body to tax all property, which

from its nature or character was susceptible of taxation. The legislature could not in that case except educational institutions, or churches, or burying grounds; it could not exempt a limited and reasonable amount of personal or real property; it could not exempt mortgages, indebtedness or stocks. There are examples of constitutions which provide flatly that all property shall be taxed, except that certain enumerated exemptions may be made. Minnesota has such a constitution. Section 3, Article 9. It was adopted from Ohio. With these two exceptions we know of no similar constitutional provisions, and it has been held under these provisions in both states that the legislature cannot make exemptions except those enumerated. These decisions rest on two grounds: first, on the express requirement that laws shall be passed taxing all property; second, that the expression of certain exemptions which may be granted infers the exclusion of other exemptions. But, as the Supreme Court of the State of North Dakota well said in *Northern Pacific R. Co.* vs. *Barnes*, 2 N. D. Reports, 310–330:

> "But it has never seriously been doubted that the legislature had the power to make such exemptions from taxation as it saw fit. The power has certainly been exercised, without question or objection, ever since the organization of the territory. Every revenue law has contained provisions exempting certain kinds and species of property, and it would be with great reluctance and only upon the most cogent reasons that this court would, at this late day, cast doubts upon the validity of the exercise of a power that has so long been supposed to exist, and that has been exercised for more than thirty years without question or objection."

We believe it has never been doubted, under state constitutions similar in form to the enabling act of Dakota, that the legislature may select the property which shall bear the burden of taxation. It may exempt mortgages and other indebtedness, it may say that homesteads shall not be taxed, it may exempt a certain amount of personal property, it may say that horses shall be taxed but cows not. This power is a part of ordinary legislative power, unless the legislature is shorn of it by or-

ganic law, and the power is clearly recognized in the act in question by the words "but all property *subject to taxation* shall be in proportion to the value of the property taxed."

It is therefore clear that the words "nor shall any discrimination be made in taxing different kinds of property" were not intended absolutely to prevent everything that might in the broadest sense be termed "discrimination," for this language is modified by the following clause, the two connected together by the disjunctive "but." To understand what Congress meant both clauses must be read together, and one as modifying and interpreting the other. All discrimination was not prohibited. This is plain from the power of the legislature to select the property which should be subject to taxation, and the necessarily inferred power of omitting certain property or class of property, or granting exemptions.

This clause was under consideration in the case of *Ferris* vs. *Vannier*, 6 Dakota, 186, where Tripp, Chief Justice, said:

> "Congress has prohibited discrimination, which must be construed to mean unjust discrimination—a discrimination in favor of one kind of property as against another; a discrimination which prevents each kind of property subject to taxation from bearing its fair and equal share of the burden imposed on all. In this sense the words are aptly chosen; in any other they are meaningless and lead to absurd results. Under this construction we are free from many perplexities in which courts have found themselves in determining whether laws which were not discriminating were uniform. The disjunctive clause with which this provision is connected further limits and explains it. Standing alone it might be construed to mean that all property of every kind must be taxed equally without discrimination; but the words 'subject to taxation,' limiting the words and clause of which they form a part, extend their limiting power to the principal clause which the disjunctive clause itself limits, so that the meaning of both construed together is that there shall be no unjust discrimination in the taxation of the different kinds of property subject to taxation, but all such property

shall be taxed in proportion to its value. These words, 'subject to taxation,' are of importance in the construction of this section. Without them, all property would be subject to taxation; with them, only certain property is liable to taxation. Who is to determine what property is 'subject to taxation?' The courts cannot determine. It is a legislative function. It can only be exercised by the legislature or by Congress. Congress has not seen fit to exercise it, but has given to the legislature the absolute control over 'all rightful subjects of legislation,' saving and reserving to itself alone the right to modify it or annul the same. This certainly is a rightful subject of legislation, and it follows that Congress has given to the legislature the right to apportion and subject property to taxation. The legislature, then, has a right to say what property shall be subject, and what property shall not be subject, to taxation; what property shall be taxed, and what property shall be exempt from taxation—limited only by the provision that all property so subject to taxation shall be taxed without unjust discrimination in favor of one kind of property as against another, so that every kind of such property shall be taxed in proportion to its value."

The State Supreme Court of North Dakota subsequently held in *Northern Pacific Railroad Company* vs. *Barnes*, 2 N. D., p. 332, that this decision established beyond doubt two propositions, viz: (1) that the territorial legislature had full and plenary power to select the subject of taxation; and (2) that section 6 became operative only upon such selected subjects, and was absolutely of no effect in respect of property not selected for taxation.

If the power to exempt is conceded, it must necessarily follow that this includes the power to commute; also, it includes the power to classify. If horses may be exempted, the state may lawfully accept a payment in lieu of other taxation or ordinary taxation on horses. The greater power includes the less. So, if the legislature might exempt wild lands, for example, and levy all the taxes on cultivated or productive lands, this would include the power to accept a sum of money from the owner of wild land in lieu of ordinary taxation.

The only limitation on these legislative powers would be that there should be no unreasonable discrimination. It may be that, under the same circumstances and conditions, A. should be treated like B. An exemption of A.'s farm from taxation, while the farm of B. and all other persons were taxed under the same circumstances, we may safely concede, would be forbidden by the organic act; but classification is permissible providing it rests on some reasonable basis; and what such basis shall be, or whether any given basis of classification is reasonable, is mainly and ordinarily a legislative question. The courts cannot interfere except in cases where it is made plain that there is no reason for the classification, which is therefore purely arbitrary and discriminating.

The territorial law classifies real estate into two classes: first, lands ordinarily and generally; second, land grants of railway companies. Is there any reasonable basis for the classification? Railroad lands are classified by themselves, and there is no discrimination as between lands of different railroad companies. Is this classification a purely arbitrary one? A railroad corporation is public in its character, operates a public highway for the public benefit, must carry for all alike without discrimination in favor of any person or individual, and is subject to the rule that its charges must be reasonable. In all their operations such corporations are subject to public regulation. They are public to that extent that it is now well settled public taxes may be levied to aid their construction. Railroad companies are uniformly classified by themselves for the purpose of legislation, and with equal uniformity we believe they are classified by themselves in all the states for the purposes of taxtion.

But in respect to their land grants it will be urged that they are in precisely the same position as any other land owner, and that, therefore, any classification of railroad companies as to their land grants is arbitrary and discriminating. It will be noted that the so-called exemption is not gratuitous, but is paid for upon a basis that seemed fair and just to the legislature. Whether the law is wise or not is not for the court to determine.

It is impossible for the court to say whether the three per cent. tax on gross earnings would raise more, or less, revenue than would be raised by ordinary taxation; impossible, for the court, therefore, to say whether any discrimination exists, or whether, if it exists, it is against the railroad companies, or in their favor. Large public benefits were expected to follow the gross earnings tax system, providing a revenue certain to be received and easy of collection, made by the statute a lien prior to any other claim against all property of the company. It avoided the public expense of levying taxes on each parcel of land and the expense and litigation necessarily accompanying such a system of taxation.

And a railroad company as owner of a land grant is not in fact in the same position as other land owners. There is a genuine and fundamental reason for the classification attempted. Ordinary land owners may erect buildings upon their lands, may improve and cultivate them, raise crops upon them, make them income-bearing property. They may do what pleases them with their land. If sold, they may apply the proceeds to any purpose whatever, and in an infinite variety of ways make them a source of profit. The Northern Pacific Railway Company holds its lands (and the same, we think, is true of all other land grant roads) upon a trust. The lands of the Northern Pacific Company were granted to it by Congress (see section 3, act of July 2, 1864) "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores." By section 10 no mortgage could be made without the consent of Congress. The lands, it will thus be seen, were held upon trust created by act of Congress for the purpose of aiding the construction of the railroad. Neither the lands nor their proceeds could lawfully be applied or used for any other purpose whatever. And Congress, by joint resolution passed May 31, 1870, authorized the road and lands to be mortgaged "to aid in the construction and equipment of its road." Another large part of the intent of Congress

was to secure the settlement of the country within the limits of the grant, and this was doubtless also an important factor in the eyes of the Dakota legislature when it passed the act of 1883. The lands held on this trust while in the hands of the company could not be made productive; they could not be built upon, cultivated, improved and made a source of income by the company. They were necessarily held for sale, the proceeds of sale to be devoted to railroad purposes strictly, to the purpose of paying off the mortgages, the money raised upon which had constructed the road. Whatever burden of taxation was laid upon the lands would necessarily tend to advance their price, and would by so much retard the sale thereof and the settlement of the territory of Dakota.

We may well call attention to the pointed language of the Supreme Court of Minnesota upon a similar gross earnings law in that state, *City of St. Paul* vs. *St. Paul & Sioux City Railroad Co.*, 23 Minn., 471, where the court said:

> "It is part of the legislative history of the state that its policy in regard to the taxation of this and the other land-grant railroads, so-called, was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state and every portion thereof so far as possible an ultimate and adequate return for the value of the franchises conferred, including this immunity from taxation. It is also a part of this well-known history that in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act among the four original land-grant companies in 1857, the then territory (now state) adopted a distinct and special policy of taxation in reference to those companies and the lines of road which they were authorized to build, looking to the early completion of these lines, and the just rights and interests alike of the companies, the state at large and all localities therein. This policy contemplated as a basis of taxation the annual gross income or earnings of the companies, instead of an *ad valorem* assessment or valuation of their franchises and prop-

erty; and, instead of a general and local s
tem of taxation, the payment of a fixed *per cen*
of their annual earnings into the state treas
for the benefit of the whole state was provided
in lieu of all taxes whatsoever. This, it was s
posed, would prove less vexatious and burdens
to the companies, especially in the infancy of th
existence; ultimately more advantageous and p
ductive to the revenues of the state, and clea
more just and equal to all localities therein, as
would share equally in the benefit to acc
from taxes raised and contributed on account
property held under franchises derived from
whole people. Experience is fast demonstrat
the wisdom of this policy and realizing the
pectations of its founders."

And for these reasons more fully expressed in
opinion of that court, the Supreme Court of North
kota in the Barnes Case (before cited) held that th
were lawful and reasonable grounds upon which
legislature of the territory might classify land-gr
lands in one class and ordinary lands in another cla
and levy taxes as the act of 1883 provided. See opin
of the court, 2 N. D., pp. 347-351.

The weight of judicial authority in the states in
cisions touching constitutional provisions quite sim
and analogous to that of the organic law of Dakota
clearly in favor of our contention. We shall refer
court to some of the more important decisions in
states upon this question without going into unnecess
detail in respect to them. In the older states there
commonly no constitutional restriction on the power
taxation. In the more recent constitutions many s
restrictions have been introduced.

The constitution of Wisconsin provides, "The rule
taxation shall be uniform and taxes shall be levied u
such property as the legislature shall prescribe." T
provision, we think, does not differ from the Dakota
ganic act. To say that there shall be no discriminat
is substantially to say "the rule of taxation shall be u
form." Under the constitution of Wisconsin the quest
had been very much mooted and had been passed on
touched upon by different decisions of the Supreme Co

from an early day, which decisions were not altogether consistent with each other. The question finally came before the Supreme Court of that state in *Wisconsin Central Railroad Company* vs. *Taylor County*, 52 Wis., 37. It was elaborately considered by the court in its opinion, page 57 and subsequent pages, and the exemption of railroad lands was held valid.

The constitution of Iowa (adopted 1846, Sec. 30, Article 3) declares "the general assembly shall not pass local or special laws * * * for the assessment and collection of taxes for state, county or road purposes; * * * and in all * * * cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Under this provision it was decided that an act of the legislature was valid, exempting all property, including the residences of professors upon the grounds of literary institutions, and the dwellings of clergymen owned by religious societies, and used exclusively for such dwellings, without income to the owners. *Trustees of Griswold College* vs. *Iowa*, 46 Iowa, 275.

Section 1, Article 11, of the constitution of Kansas, adopted in 1859, provides "the legislature shall provide for a uniform and equal rate of assessment and taxation." This is a very strong section, not only requiring uniformity of rate but equality of rate; but an act providing a different method of assessing and collecting taxes on railroad property than other property was held not to be unconstitutional. *Railroad Company* vs. *Morris*, 7 Kan., 210. And in *Francis* vs. *Railroad Company*, 19 Kan., 303, it was held, Brewer, J., giving the opinion of the court, that an act of the legislature providing for the collection of state taxes directly through the machinery of the state government, on railroad property in unorganized counties of the state, *where no other property was taxed*, was not in violation of this constitution. The opinion of the court distinguishes constitutions providing that *all* property shall be taxed, and holds that, under the Kansas constitution, the legislature has power to exempt.

The constitution of Louisiana provided "taxation shall

be equal and uniform throughout the state. After 1848, all property on which taxes may be levied in this state shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied." In *Louisiana State Lottery Co.* vs. *New Orleans*, 24 La. An., 86, it was held that the lottery company might be exempted from ordinary taxation in consideration of its annual payment into the state treasury of a certain amount for the benefit of the school fund. And in *New Orleans* vs. *Kaufman*, 29 La. An., 283, it was held that the constitution did not prohibit the legislature from dividing the objects of taxation into different classes and imposing different taxes on each class. It merely required that the tax on each member of the same class should be the same. See also *New Orleans* vs. *Davidson*, 30 La. An., 554, and *New Orleans* vs. *Fourchy*, 30 id., 910.

The constitution of Michigan adopted in 1850 provided "the legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law." And Section 12 said "all assessments hereafter authorized shall be on property at its cash value." In *People* vs. *The Auditor*, 7 Mich., 84, an act of the legislature of 1853, remitting certain taxes for the term of five years to the contractors of a ship canal under a land grant to aid the canal, was held valid, Martin, C. J., saying:

> "This provision of the constitution has no reference to the power to exempt or to remit taxes, which is, and necessarily must be, to a great extent, left to the discretion of the legislature. * * * * The legislature has the power of prescribing the subjects of taxation and of exemption, but it cannot arbitrarily tax property according to locality, kind or quality without regard to value, but in this respect it must act by uniform rule. But to exempt property as is done in the case of church, school or library property, or to remit taxes for any cause, has nothing to do with the uniformity of the rule of taxation." Pages 90–91.

Manning, J.; said also:

> "There is nothing in the constitution in express terms inhibiting the enactment of the law by the legislature. * * * The two sections taken together mean that all descriptions of property *subject to taxation* shall pay such proportion of a tax as their cash value bears to the aggregate cash value of the whole property subject to the tax."

And the judges agree that it was competent for the legislature to exempt the lands from taxation for five years. See also the opinion of the court by Judge Cooley in *Youngblood* vs. *Sexton*, 32 Mich., 406.

The constitution of New Jersey adopted in 1875 provided "property shall be assessed for taxes under general laws and by uniform rules, according to its true value." Under this provision it was held that an act exempting mortgages from taxation, except under certain conditions, was constitutional. *State, Vail's Ex'rs* vs. *Runyon*, 41 N. J. Law, 98.

Section 1 of Article 9 of the new constitution of Pennsylvania, adopted in 1873, provides "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may, by general laws, exempt" certain property named. In *Kittanning Coal Co.* vs. *Commonwealth*, 79 Pa. St., 100, it was held that an act taxing coal companies on their franchises and property according to the amount of coal mined is constitutional. Agnew, C. J., said in the opinion of the court:

> "Clearly there is nothing in this (constitutional provision) prohibiting the power to classify. Will it be argued that persons or the owners of property cannot be classified? For example, can it be said that all single freemen cannot be required to pay a uniform tax? Or that the owners of horses or mules or of cattle cannot be taxed upon their horses, mules and cattle at a certain rate? Or that the owner of unseated lands, or of farms or mills, or houses and lots, cannot be taxed at a uniform rate? What difference is there between saying that all horses and mules shall be taxed a certain rate, and saying that the owners of these horses and mules shall be taxed

at the same rate upon them? The distinction is evidently unmeaning. Persons pay taxes, not property. This is so even when the remedy for the recovery of the tax is *in rem.* The law only takes hold of the property as a means of enforcing the duty of the person. When the constitution enjoins uniformity of taxation, it is because of the right of the citizen, not of a right possessed by his property * * * Hence, when the constitution said that all taxes shall be uniform upon the same class of subjects within a given territory, it did not mean to separate the property from its owners, or that property and not persons should pay taxes. This would be simply absurd, for inanimate things cannot perform duties. Taxes shall be uniform, because of the right of the citizens to bear no more than equal burdens. * * * But without the power to classify men, as well as things, this undesirable inequality cannot be avoided; for if visible or tangible things only can be classified for taxation, then those whose wealth consists in that which is not visible or tangible, though it be far beyond the few visible effects of the poorer citizen, will not bear their proper share of the public burden. And among corporations or artificial persons the same result will take place. * * * But by classification this inequality between persons, natural or artificial, can be avoided. It is clear therefore, that the moment we concede the power to classify, we have disposed of the question of uniformity, for then all that is required by the constitution is uniformity of taxes among the members of the class * * * We must conclude therefore that a classification of coal mining and purchasing and selling companies is not beyond the legislative power, and the tax being clearly uniform upon their business, measured by the extent of it, is not only within the meaning of the constitution, but is equal and just."

The constitution of Mississippi provided, "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." These provisions seem to be much stronger than those of the organic act of Dakota, and yet in *Mississippi Mills* vs. *Cook*, 56 Miss., 40, a statute was sustained providing for the exemption of all factories "for the manufacture of cotton and

woolen goods, or yarns, or fabrics composed of those or any other materials."

The constitution of Missouri of 1820 provided "that all property subject to taxation in this state shall be taxed in proportion to its value." It was held in *Crow* vs. *State*, 14 Mo., 237, that this provision did not prohibit the legislature from making exemptions. See also *Hamilton* vs. *St. Louis County Court*, 15 Mo. 3; *State* vs. *North*, 27 Mo., 464, 483.

The constitution of Illinois provides "the general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." But the exemption of the Illinois Central Railroad Company from ordinary taxation in consideration of paying into the state treasury a per centage on its gross earnings was held valid in *Illinois Central Railroad Co.* vs. *McLean*, 17 Ill., 291. In the case of *Hunsaker* vs. *Wright*, 30 Ill., 146, it appeared that the charter of a city provided that its inhabitants should be exempt from performing labor on the roads beyond the city limits, or taxes to procure labor for such purpose, and the property within the city should be exempt from taxes levied for county purposes; provided the city should support the resident paupers thereof, and pay the expenses of the Circuit Court in all criminal cases, for offenses committed by citizens, and all jail fees accruing therefrom. The court held that while under the Illinois constitution the legislature could not exempt a person or community of persons from their share of the public burdens, still the legislature might commute a tax for an equivalent burden, and that in commuting, the general assembly was the sole judge of the sufficiency of the equivalent to be received in lieu of the tax.

In Arkansas the constitution provided "all property subject to taxation shall be taxed according to its value—that value to be ascertained in such manner as the general assembly shall direct; making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed

higher than another species of property of equal value." The decisions under this provision are quite numerous and for lack of space we merely refer to them. They will be found to sustain our contention. *State* vs. *Crittenden County*, 19 Ark., 360; *St. Louis R. R. Co.* vs. *Berry*, 41 Ark., 509; *Arkansas Midland Ry. Co.* vs. *Berry*, 44 Ark. 17; *Cairo Railroad Co.* vs. *Parks*, 32 Ark., 131; *Memphis Railroad Co.* vs. *Berry*, 41 Ark., 436.

In *Northern Pacific Railroad Company* vs. *McGinnis*, 4 N. D., 494, the court overruled the Barnes case, but on the theory (at least as to a portion of the court) that the question involved was a federal question and that the decision of Judge Caldwell and District Judge Thomas in *Railroad Company* vs. *Walker*, 47 Fed. Rep., 681, was binding on the state court.

(b) It has been sometimes objected to this and similar acts that they are invalid as to the interstate earnings, or any proportion thereof, of railroad companies; this on the ground that they impose a tax on interstate commerce.

The first answer to such a proposition, as applied to this case, is obvious, and it seems to us conclusive, viz: that the railroad company has paid its tax according to the claim of the Territory of Dakota, and has paid both on its state and interstate earnings. If the act were void as imposing a tax on interstate earnings, it does not lie in the mouth of a third person, after the tax has been paid, to raise the question of invalidity of the law on this ground. The railroad company, on whom is imposed the invalid tax, is the only person who could raise the question. Courts do not sit to declare legislative acts void unless the question is properly presented by a party in interest having a right to object to the law; or, in other words, unless the question is necessary to be passed upon in order to decide the case. In each case as it arises, the court, being required to declare the law of that case, must apply the constitution as the paramount law. The constitutional objection will consequently not be listened to unless a party makes it appear clearly that his rights are actually affected, and that a decision on the validity

of the law is necessary. The constitutionality of a statute can be taken advantage of by those only who have a right to question the act. *Cooley's Constitutional Limitations*, 163, 164, 180, 181. The railroad company, having paid the alleged invalid tax, would be estopped to recover it back. *Daniels* vs. *Tearney*, 102 U. S., 415.

But if the constitutionality of the law upon this ground were properly before the court, the recent decisions of this court, as we understand them, leave little room to doubt that the law would be sustained. The tax is not a tax on earnings as such, but is a tax on the railroad and other property of the company. Because of the difficulty—not to say impossibility—of fixing upon the cash value of the property of a railroad company, the legislature has chosen to measure that value by its earning capacity. The provision that a fixed per centage of gross earnings shall be in lieu of all other taxes whatever on the property, clearly shows that the legislature levied the tax as one upon the property of the company, not upon its earnings, state or interstate, as earnings. And the tax was not levied upon franchises, or upon the privilege or right to do business. Franchises and privileges, and the right to do business in the state are nowhere mentioned in the act. *Adams Express Co.* vs. *Kentucky*, 166 U. S., 171; *Adams Express Co.* vs. *Ohio State Auditor*, id., 185; *Henderson Bridge Co.* vs. *Kentucky*, id., 150; *Adams Express Co.* vs. *Ohio*, 165 U. S., 194; *Western Union Telegraph Co.* vs. *Massachusetts*, 125 U. S., 530; *Massachusetts* vs. *Western Union Telegraph Co.*, 141 U. S., 40; *Maine* vs. *Grand Trunk Railway*, 142 U. S., 217; *Pullman's Palace Car Co.* vs. *Pennsylvania*, 141 U. S., 18; *Delaware Railroad Tax Case*, 18 Wall., 208.

(c) If it be argued, as it sometimes has been, that the Dakota law violates the Fourteenth Amendment to the Constitution of the United States, the conclusive answer is to be found in the decisions of this court. This court has repeatedly held that the Fourteenth Amendment does not oblige the states to adopt an equal and uniform plan of taxation. It was not "intended to compel a

state to adopt an iron rule of equal taxation." *Bell's Gap Railroad* vs. *Pennsylvania*, 134 U. S., 232; *Home Insurance Company* vs. *New York*, 134 U. S., 594; *Pacific Express Co.* vs. *Seibert*, 142 U. S., 339; *Giozza* vs. *Tiernan*, 148 U. S., 662; *Adams Express Co.* vs. *Ohio* 165 U. S., 194, 228. The remarks which we have made in regard to classification, as permissible under the organic law of Dakota, are pertinent to classification with reference to the Fourteenth Amendment. And as sustaining the Dakota act in question we might well refer to the Ohio decisions, reviewed and commented upon in the *Adams Express Company Case*, 165 U. S., the constitution of Ohio being fully as strong to restrict legislative action as the Dakota organic law.

V.

The fifth question is whether, "Conceding the territorial law of 1883 to be valid and to apply to the property in question, are the payments upon the gross earnings of the company for 1888 alleged in the bill sufficient to entitle the complainants to the equitable relief sought?"

The allegations of the bill show payment in full of the amounts claimed by the Territory against the gross earnings of the company for 1888, and those payments made in the year 1889. There were two equal payments of $46,937.09 each, the last one made August 15, 1889. We are not clear as to just what question of doubt was in the mind of the Circuit Court of Appeals when it certified this question. The parties we believe requested no such question to be certified, and treated this case at the Circuit as if the allegation were sufficient. If any doubt can be entertained on the subject, it must we think refer only to the inquiry as to the time of these payments; as to whether, in other words, the payments were made on or before the day fixed by law. Such a question, we insist, cannot be raised by the defendants. The allegation of the bill is clear that the company paid this money, amounting to nearly $94,000, and being the full sum claimed by the Territory to be due; the Territory accepted and retains the money; it had undoubted power, even if the payments were not ex-

actly on time, to waive the mere matter of time and accept them. At least no third person having no direct interest in such moneys has any standing to say that the payments were not in time.

While it would perhaps be going too far to claim that the state officers could estop a territory or its counties by such receipt of the money in case the law under which it was paid was unconstitutional, still it may well be held that the acceptance of such money and its retention by the Territory will estop the public authorities and all claiming under them from raising a mere technical objection, that the money was not paid on the exact day when it was due. Courts of equity love to relieve against forfeitures. Forfeitures are not favored by the law and the Territory could clearly waive its right to insist on a forfeiture. *Carver* vs. *Jackson*, 4 Pet. 1, 87; *Fletcher* vs. *Peck*, 6 Cranch, 87; *Randolph County* vs. *Post*, 93 U. S., 502; *Murphy* vs. *Packer*, 152 U. S., 398.

But the payment was in time. As to the tax of 1888 the time of payment was controlled by the act of 1883. If the time of payment specified in the act of 1883 was in any wise changed by the act of 1889, such change had reference to the act of 1889 only; that is, railroad companies were to pay upon the time specified in the act of 1889, as a condition for their property being exempted in 1889 and years subsequent thereto. So far as the exemption for 1888 was concerned, that could be secured by payment according to the terms of the law of 1883. Even if section 7 of the act of 1889 should be construed as providing that companies in default should pay their full taxes in default within thirty days after the passage of that act, the penalty named by that section is "before they can avail themselves of the provisions of *this act.*" And that "any company failing to strictly comply with the provisions of this act within the term herein provided, shall be immediately subject to assessment and taxation," meaning of course subsequent assessment and taxation. Again, further on in the section it is provided, that companies shall make defaulted payments due under the act of 1883 within a certain time "or *the same*,

(*meaning this act*) shall not apply to such company or companies."

The act of 1883, it will be noted, contains no provision such as that, in default of payment upon the day named, the lands or property of such company shall become subject to ordinary taxation; the only penalty being that for default a sum may be added to the gross earnings tax, distraint may be made therefor, and the property of the company is subjected to a lien for the payment of the tax and penalty. On the contrary the law of 1889 introduced this new feature: that if the company did not pay its taxes on or before certain dates, the lands should thereupon become subject to ordinary taxation. But the taxes in question were levied for the year 1888 and the law of 1889 could not authorize and was not intended to authorize an assessment *for 1888*, because the terms of the law of 1889 were not complied with. Indeed, the taxes complained of were levied in 1888 before the law of 1889 was passed.

It is most clearly a proper construction of the law of 1883 that the tax on the gross earnings of any given year was to be paid in two equal payments, February and August of the *following* year. The law could not be put into operation on any other construction. The tax, for example, on gross earnings for 1885 could not be paid half in February, half in August of 1885, because neither the company nor the state could tell what the earnings were until the close of the year 1885. The law clearly gives a month and a half after the close of each year for the company to determine and report its earnings and make its first payment. Indeed, it is identical with the ordinary plan of taxation on all property. Other property is assessed, the tax levied and extended in one year, but it commonly falls due during the next year.

It seems clear to us that no change in this particular was intended to be introduced by the law of 1889, and that this court fell into an error in *Northern Pacific Railroad Co.* vs. *Clark*, 153 U. S., 252, as to the dates when payments were due under the act of 1889. This view is not important because such suggested error was

immaterial to the decision, the company having paid no gross earnings tax for 1889, and not offering to pay any, and it being due when the bill was filed. This error is suggested simply as bearing upon the construction which the court may give to the law of 1883. It is of necessity universally true in states where gross earnings taxes are levied, like Wisconsin, Minnesota, formerly North Dakota, that the law provides payment of a percentage in each year upon the gross earnings of the prior year.

C. W. BUNN,
Counsel for Appellants.

APPENDIX.

CHAPTER 99

OF LAWS OF DAKOTA TERRITORY, 1883.

COLLECTION OF TAXES ON RAILROAD PROPERTY.

AN ACT TO PROVIDE FOR THE LEVY AND COLLECTION OF TAXES UPON THE PROPERTY OF RAILROAD COMPANIES IN THIS TERRITORY.

Be it Enacted by the Legislative Assembly of the Territory of Dakota:

SECTION 1. *Percentage of Gross Earnings to be Paid in Lieu of Other Taxes.* In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this Territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this Territory, as hereinafter stated, that is to say:

Every such railroad corporation or person operating a railroad in this Territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said payments shall be made one-half ($\frac{1}{2}$) on or before the fifteenth day of February, and one-half ($\frac{1}{2}$) on or before the fifteenth day of August, in each year, and for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company; an abstract whereof shall be furnished by said company to the treasurer of this Territory on or before the first (1st) day of February in each year; the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits

and the correctness of such abstracts, full power is hereby vested in the Governor of this Territory, or any other person appointed by law, to examine under oath the officers and employes of said company, or other persons, and if any person so examined by the Governor or other authorized person shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the Territory the payment of the aforesaid per centums, it is hereby declared that the Territory shall have a lien upon the railroad of said company and upon all property, estate and effects of said company whatsoever, personal, real or mixed. And the lien hereby secured to the Territory shall have and take precedure of all demands, decrees and judgments against said company.

SEC. 2. *Where Company shall Fail to Make Return.* If any railroad company in this Territory shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and manner provided by law, and such default shall continue during the period of thirty (30) days, such company shall be subject to a penalty in an amount equal to twenty-five (25) per cent of the tax imposed upon such company by this act. And the treasurer of the Territory shall forthwith ascertain the amount of such tax justly due from such company as nearly as may be from such evidence as may be available, and shall thereupon collect such tax, as so ascertained, together with the said penalty thereon. The amount of tax ascertained by the Territorial Treasurer as in this section provided shall, together with the said penalty thereon, be by him entered in the books of his office; and such entry, when so made, shall stand in the place of the report required by law to be made by such company; and shall, in all courts within this Territory, be evidence of the amount of such tax and penalty, and of the other facts stated therein in pursuance of this act.

SEC. 3. *Neglect to Pay Taxes.* In case any railroad company shall fail or neglect to pay the taxes reported by it to be due, in pursuance of this act, for the period of thirty (30) days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten (10) per centum thereof, as a penalty for such failure or neglect to pay.

SEC. 4. *Territorial Treasurer to Distrain.* At any time after the expiration of the period of thirty (30) days after any tax has become due and payable under the provisions of this act, the Territorial Treasurer or his deputy shall distrain sufficient goods, chattels or other movable property, if found within this Territory, to pay the taxes or per centum due from such corporation, together with the penalty thereon herein provided; and shall immediately advertise the sale of the same in at least three newspapers published within this Territory, stating the time when and the place where such property shall be sold. Such sale shall take place at some point on the railroad of such delinquent company, and at least four (4) weeks notice of the time and place of such sale shall be given. Such delinquent company, its successors or assigns, may pay any such taxes and penalty at any time before the sale of property distrained as herein provided; and thereupon

further proceedings in connection with such distress shall cease, and the property distrained be surrendered to the owner thereof.

SEC. 5. *Lands Subject to Taxation.* The lands of any railroad company shall become subject to taxation in the same manner as other similar property, as soon as the same are sold, leased or contracted to be sold or leased; and on or before the first day of April of each year each railroad company having lands within this Territory shall return to the county clerk of each county full and complete lists, verified by the affidavits of some officer of the company having knowledge of the facts, of all lands of such company situated in such county, sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A. D. 1883, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, or contracted to be sold or leased, prior to the last day of December, A. D. 1882.

SEC. 6. *How Tax Apportioned.* The moneys received and collected by the Territorial Treasurer in pursuance of *the* (this) act shall be disposed of by him as follows:

One-third (⅓) hereof shall be retained in the Territorial Treasury for the use of the Territory, and the remainder shall be apportioned among the several counties into or through which railroads *respectfully* (respectively) run in proportion to the number of miles of main track situated in such counties respectively.

SEC. 7. That all acts or parts of acts in conflict with this act are hereby repealed.

SEC. 8. This act shall take effect and be in force from and after its passage.

Approved March 9, 1883.

CHAPTER 107

OF LAWS OF DAKOTA TERRITORY, 1889.

LEVY AND COLLECTION OF TAXES ON RAILROAD PROPERTY.

AN ACT PROVIDING FOR THE LEVY AND COLLECTION OF TAXES UPON PROPERTY OF RAILROAD COMPANIES IN THIS TERRITORY.

Be it Enacted by the Legislative Assembly of the Territory of Dakota:

SECTION 1. *Percentage of Gross Earnings to be Paid in Lieu of Other Taxes.* In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of said railroad company there

shall hereafter be paid into the treasury of this Territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operating of such railroad, as shall be situated within this Territory, both upon Territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided.

Every such railroad corporation or person owning or operating or that may hereafter own or operate any line of railroad in this Territory which shall have accepted this act shall pay to said Treasurer each year "for the first five years" after the approval of this act an amount equal to three per centum of such gross earnings, "and for and in each and every year after the expiration of such five years an amount equal to two per cent. of said gross earnings," and the payment of such amount annually as aforesaid shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid.

Said payment shall be made, except as hereinafter provided, one-half on or before the fifteenth day of February, and one-half on or before the first day of August in each year. And for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company. An abstract shall be furnished by said company to the Treasurer of this Territory on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the Treasurer and Secretary of such company, and, for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the Governor of this Territory, or any other person appointed by law, to examine under oath the officers, employes of said company or other persons, and if any person so examined by the Governor or other authorized person shall knowingly or wilfully swear falsely, concerning the matter aforesaid, every such person is declared to have committed perjury, and for the purpose of securing to the Territory the payment of the aforesaid per centum, it is hereby declared that the Territory shall have a lien upon the railroad of said company, and upon all property, estate, or effects of said company whatsoever, personal, real or mixed, and the lien hereby secured to the Territory shall have and take precedence of all demands, decrees and judgments against said company.

SEC. 2. *When Company Shall Fail to Make Return.* If any such railroad company having accepted this act shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and in the manner provided by law, and such default shall continue during the period of thirty days, such company shall be subject to a penalty of an amount equal to ten per cent. of the tax imposed upon such company by this act, and the Treasurer of the Territory shall forthwith ascertain the amount of such percentage justly due from such company, as near as may be, from such evidence as may be available, and shall thereupon collect such amount so ascertained, together with the said penalty thereon.

The amount so ascertained by the Territorial Treasurer as in

this section provided, shall, together with the said penalty thereon, be by him entered in the books of his office, and such entry when so made shall stand in the place of the report required by law to be made by such company and shall, in all courts within this Territory, be evidence of the amount of such tax and penalty and of the other facts stated therein in pursuance of this act.

SEC. 3. *Neglect to Pay Taxes.* In case any railroad company which shall have accepted the provisions of this act shall fail or neglect to pay the amount reported at the time and in the manner hereinafter provided, for a period of thirty days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten per centum thereof as a penalty for such failure or neglect to pay.

SEC. 4. *Territorial Treasurer to Distrain.* At any time after the expiration of the period of thirty days after the amount as above provided has become due and payable under the provisions of this act, the Territorial Treasurer or his deputy shall distrain sufficient goods, chattels or other movable property if found within this Territory to pay the said amount due from such corporation, together with the penalty thereon as hereinafter provided and shall immediately advertise the sale of the same in at least three newspapers published within this Territory, stating the time when, and the place where such property shall be sold; such sale shall take place at some point on the railroad of such delinquent company, and at least four weeks notice of the time and place of such sale shall be given; such delinquent company, its successors or assigns may pay in such amount and penalty at any time before the sale of the property distrained as herein provided, and thereupon further proceedings in connection with such distress shall cease and the property distrained shall be delivered to the owner thereof.

SEC. 5. *Land Subject to Taxation.* The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased or contracted to be sold or leased, and on or before the first day of April of each year each railroad company having lands within this Territory shall return to the county clerk of each county within this Territory full and complete lists, verified by the affidavit of such officers of the company having knowledge of the facts, of all lands of such company situated within such county sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A. D. 1889, in compliance with the terms of this section, shall include a complete list of all lands sold or leased prior to the last day of December, 1888.

SEC. 6. *How Taxes Apportioned.* The moneys received and collected by the Territorial Treasurer in pursuance of this act shall be disposed of by him as follows: In case the railroad company paying such tax owns no land granted in aid of the construction of its railroad, one-third of the same shall be retained in the Territorial treasury for the use of the Territory, and the remainder shall be apportioned among the several counties into or through which the railroad or railroads of such companies run, in

proportion to the number of miles of main track situated in such counties respectively. In case the railroad company paying such tax owns land granted in aid of the construction of its railroad, then thirty per cent. of the tax paid by such company shall be retained in the Territorial treasury for the use of the Territory, and forty per cent. shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in proportion to the number of miles of main track situated in such counties respectively, and thirty per cent. shall be apportioned among the several counties in which lands forming a part of its land grant is situated, in proportion to the number of acres of surveyed and unsold lands in said counties.

SEC, 7. *Any Railroad Company* Which at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this Territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the Secretary of the Territory. accept and become subject to the provisions of this act, and provided that any railroad company which is now in arrears in the payment of taxes assessed under chapter 99 of the laws of 1883, shall, within thirty days after the passage of this act, pay into the Territorial treasury the full amount of the taxes and interest due under the assessments under said laws of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both Territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and the taxation of the property of individuals of this Territory, and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the session laws of 1883 by paying all taxes claimed on gross earnings, both Territorial and interstate, or by filing an account of gross earnings, both Territorial and interstate, shall prepare and file such account in the manner therein provided within thirty days from the passage hereof, and pay one-half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the Territory on local and interstate earnings of such companies, but remaining unpaid at the time of filing said account, and within thirty days after the passage of this act, or the same shall not apply to such company or companies. The balance of said taxes due for the current year shall be paid to the Territorial Treasurer on or before the fifteenth day of August, 1889. Any railroad company that may be hereafter organized in this Territory, or that shall hereafter become the owner of or engaged in operating any lines of railroad in this Territory, may accept and become subject to the provisions of this act by filing a resolution of its board of directors in the manner as hereinbefore provided.

In case any such railroad company shall accept and become subject to the provisions of this act, it shall, at the time of filing

such acceptance, render an account of gross earnings, both Territorial and interstate, in the manner as hereinbefore provided, and shall pay, at the time of rendering such account, all amounts claimed by the Territorial Auditor as tax due on the local and interstate earnings of such company for the current or any preceding year, and shall thereafter pay an amount equal to three per centum of such account, as follows: If such acceptance is filed on or before the fifteenth day of February in any year such company shall pay one-half of said amount on said fifteenth day of February and the balance on the fifteenth day of August following. Should such acceptance be filed before the fifteenth day of August and after the fifteenth day of February in any year, then an amount equal to three per centum of such account shall be paid in full on or before the fifteenth day of August in each year. Thereafter, accounts shall be rendered and payments made in the manner provided in this act; *Provided*, that any company failing to promptly and strictly comply with the provisions herein set forth, and to pay all sums herein provided to be paid, shall be subject to assessment and taxation in the same manner as individuals.

SEC. 8. *In Case of Non-acceptance.* The railroads and property of all railroad companies owning or operating lines of railway in this Territory, which companies shall not accept and become subject to the provisions of this act, shall not be entitled to the exemption in this act contained, but shall be subject to taxation in such manner as shall be provided by law.

SEC. 9. *Repeal or Amendment.* This act shall be subject to repeal or amendment by any future legislature, and nothing herein contained shall be construed as a repeal of any revenue law now in existence, as applicable to any railroad company which shall not accept the provisions of this act as herein provided.

SEC. 10. *Effect When.* This act shall take effect and be in force from and after its passage.

Approved March 7, 1889.

No. 139.

Brief of Camp for Appellees.

Filed Nov. 26, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 139.

EDWIN H. McHENRY AND FRANK G. BIGELOW AS RECEIVERS OF THE PROPERTY OF THE NORTHERN PACIFIC RAILROAD COMPANY, APPELLANTS,

vs.

LORE ALFORD, J. C. GATES, A. D. STEPHENS, SUMNER R. CLARKE AND D. C. LAKE, APPELLEES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEES.

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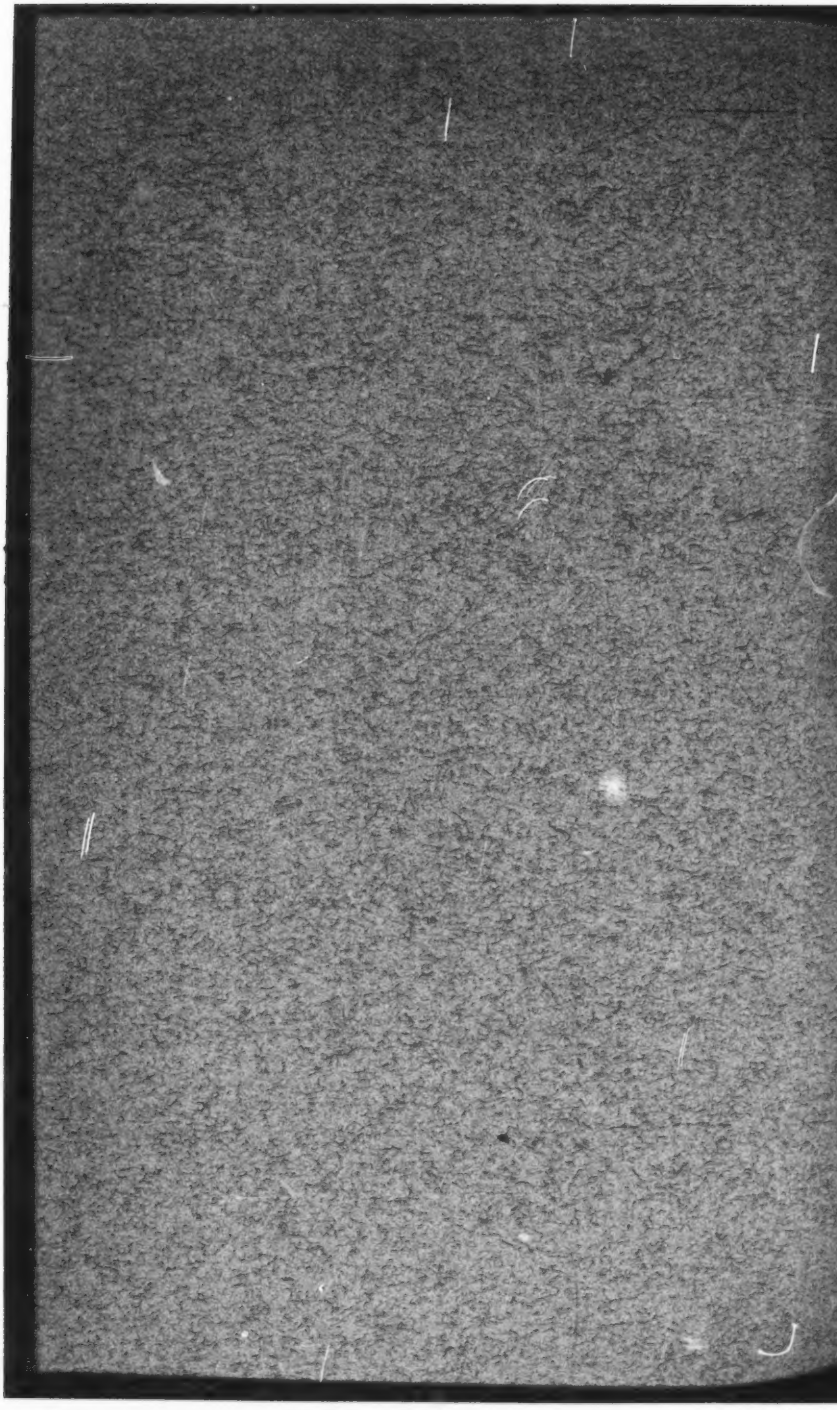

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The Six Questions Certified to this Court will be Considered in this Brief in their order.

FIRST.

HAD THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF NORTH DAKOTA JURISDICTION TO HEAR AND DECIDE SAID CASE?

Either in copying the petition for removal or in printing the transcript an error has been made; the words "and a citizen of" have been omitted from the printed record after the word "of" near the end of the seventh line from the bottom of the second page of the printed record. The petition stated both the residence and citizenship of Henry C. Rouse, just as it appears by the transcript to show that of the other plaintiffs.

The proceedings for the removal of this case from the State to the federal court were based on diverse citizenship and a separable controversy. The same rule should be applicable to receivers as to executors, namely that their citizenship and not the place of their appointment determines the right of removal. But if otherwise, then the receivers were shown by the record to be acting under orders of the Circuit Court of the United States for the District of North Dakota. (The complaint filed in the State court contained substantially the same allegations which are set out in the amended bill filed in the federal court (Transcript, folio 2); the allegations as to the appointment of the receivers appear in the transcript at folios 15 and 16, page 11). And the petition for removal stated that the petitioner was a citizen of Illinois.

If any defects existed in the proceeding to remove, the plaintiffs, by not moving to remand, waived any objection which they might have made.

Gerling *v.* B. & O. R. R. Co., 151 U. S., 673.

It appears that the cause might have been begun in the federal court, and so it will not be remanded by an appellate court for reasons first urged in that court.

Gerling *v.* B. & O. R. R. Co., *supra*;
Bank *v.* Winslow, 102 U. S., 256;
Removal Cases, 101 U. S., 457.

But certainly the receivers appointed by the federal court might have sued in that court; might even have been required by that court to sue therein. In fact, after the cause was removed an amended bill was filed omitting all defendants except those represented by counsel for the petitioner for removal. So that all questions as to the separability of the controversy were eliminated. And the federal court proceeded to hear and determine a cause confessedly within its jurisdiction.

SECOND.

WERE OR WERE NOT THE LANDS DESCRIBED IN THE BILL OF COMPLAINT SUBJECT TO TAXATION UNDER THE LAWS OF THE TERRITORY OF DAKOTA IN THE YEAR 1888, BY REASON OF THE FACTS STATED IN THE BILL OF COMPLAINT RESPECTING THE CONDITION OF THE TITLE THEREOF?

The facts referred to are these:

The grant of lands to the Northern Pacific Railroad Company included all odd sections within forty miles of the line of definite location, excepting mineral lands and lands reserved, sold, granted, or otherwise appropriated, and those subject to prior valid pre-emption or other claims or rights. The lands involved are within the forty-mile limit; are odd sections. At the time of filing map of definite location they had not been reserved, sold, granted, or otherwise appropriated, and up to that time there had been no filings, entries, or applications to make filings or entries for any of them. Prior to 1888 the lands were surveyed by the United States, and by the surveyors reported to be non-mineral. After the road had been built and before 1888 the railroad company prepared in due form and filed in the local land offices lists of lands claimed by it under the grant, including all lands here involved and paid the lawful fees for such filings. The officers of the United States thereupon proceeded to examine the lands and adjust the grant and to determine if any of the lands were mineral or were for any other reason excepted from the grant. Such examination is not yet completed so far as it relates to the lands described in Schedule "A" annexed to the bill, and the officers have not yet determined whether or not for any reason those lands are excepted from the grant. That in 1892 the officers did decide that the lands described in

Schedule "B" annexed to the bill had been granted to the company and so patented those lands. After the filing of those lists in the land offices, and before 1888, the United States set up a claim adverse to the company to all the lands involved; and questioned and contested the company's claim, and that contest was pending when the tax proceedings here sought to be set aside were had. That contest was over questions of fact, and none of the lands were certified or patented to the company till after the lands had been sold for said taxes, until after which time the United States asserted a "potential claim" to the lands by reason of the non-identification thereof as part of the granted lands. This Court has held that until patents have been issued lands within the limits of this company's grant are open to appropriation under the laws relating to mineral claims. The orators believe that some of the lands described in Schedule "A" will be determined to be mineral or not free from pre-emption or other claims or rights, and so excluded from the grant. But the orators cannot say what particular tracts will be held to be so excluded. The delay in identifying and segregating the granted lands is not due to any act or omission of the company or the receivers. (See Transcript, folios 9 to 13.)

The plaintiffs assert the non-taxability of their lands upon two grounds. First, that it is not certain that the lands are free from "pre-emption or other claims or rights at the time of the grant." Second, that it is not certain that the lands are non-mineral. And that the Government was investigating these matters when the taxes in question were levied.

Facts, of which the court will take judicial notice, show that the lands were free from claims and rights.

It is a fact, ascertainable from published public records and documents, that until after the filing by the company of its map of definite location of its route opposite these lands all of them continued to be Indian country and not open to settlement or claim by whites.

Buttz *v.* Northern Pacific Railroad Company, 119 U. S., 55;
Report of Commissioner of G. L. O. 1881, p. 182.

And the Buttz case holds that none of the lands lying (as do those in question) between the James and Red Rivers within the limits of the grant, were open to entry at the Land Office until after the filing of said map. The first surveys of lands within the limits of North Dakota seem to have been made in 1871.

Report of the Commissioner of the G. L. O., 1871, p. 111.

But the plats were not filed nor the land open to entry until 1872.

(See Buttz case.)

None of the lands mentioned in the complaint were surveyed until after the filing of said map. Then, since the lands east of the James River were Indian lands when the map was filed, they were free from pre-emption or other claims or rights at that time.

(See Buttz case.)

And also because none of the lands here involved were then surveyed, they must have been free from pre-emption or other claims.

(Buxton *v.* Travers, 130 U. S., 232.)

The Railroad Company has enjoyed and asserted possession and ownership too long to deny now the taxability of the lands.

It is well known that the Northern Pacific Railroad Company has brought ejectment for lands in North Dakota; one instance being the case of—

Butz *v.* N. P. R. R. Co., 119 U. S., 55.

See also—

Salt Co. *v.* Tarpey, 142 U. S., 241;
St. P. & P. R. Co. *v.* N. P. R. Co., 139 U. S., 1;
Whitney *v.* Taylor, 158 U. S., 85;
S. P. Ry. Co. *v.* Whitaker, 109 Cal., 26;
N. P. *v.* Musser, 68 Fed., 993.

It appears from the bill in this suit that the Northern Pacific Railroad Company has three times at least mortgaged these very lands. (Transcript, folios 14 and 15.)

The grant conveys sufficient title to specific tracts to protect the company against an action for cutting timber.

U. S. *v.* N. P., 67 Fed., 890;
U. S. *v.* N. P., 152 U. S., 285.

It thus appears that the railroad company has for years asserted and maintained title to these lands, and claims to be "the owner of the absolute title * * * for every purpose except as to the right of taxation by the States."

N. P. *v.* Wright, 54 Fed., 67; S. C., 51 Fed., 68; Opinion of Judge Knowles.

The pendency of a dispute in the Land Office over these lands does not render them non-taxable.

It is well established that after a pre-emptor or homesteader has done everything which the law requires to make an entry of public lands, they become then taxable as his property. It is true that his entry may subsequently be cancelled by acts of the General Land Office, and in that event the taxes which have been levied, and any tax deeds which have been issued upon such lands would be void, but

could he, because, upon the suggestion of some adverse claimant, the United States Government was investigating and questioning his right to the land, obtain an injunction against the sale of the land for taxes, or avoid taxes which had been levied upon the land?

Supposing that after patents have been issued to this company, the United States sues to set aside such patents on the ground of mistake, and in such proceeding, whether by notice of *lis pendens* or by notice which the filing of the bill would give in law, or by a restraining order, hinders or stops the company from disposing of the lands, and from enjoying the lands in any way. During the ten or a dozen years that such a suit might be pending could the railroad company successfully contend that the lands were not taxable because the United States was claiming adverse title to them? What difference does it make whether it is the United States which is claiming adverse title or Smith or Jones? The railroad company is in no more danger of paying taxes on property which it does not own in the one case than in the other.

Supposing that instead of the United States as the adverse claimant, we take such a case as is familiar to those who have been engaged in the land-office business, viz: a settler claiming a right of entry on lands which he asserts were included within the Military Reservation at the time of the definite location of the road. Now, in such a case, the railroad company claims title under its grant. The settler, instead of the United States, claims that the land was excluded from the grant and open to his entry. The settler's entry is allowed in the district office and his final receipt issued to him in due course. Can it be that the railroad company could successfully assert the non-taxability of such tracts of land on the ground simply that title was in controversy before the United States Interior Department?

The principle underlying this branch of the case is well stated in—

Robinson *v.* Garr, 6 Cal., 273;
Witherspoon *v.* Duncan, 4 Wall., 210.

Congress has declared and made the lands taxable.

The Act of Congress, 24 Stat. Large, p. 143, provides—

> "That no lands granted to any railroad corporation by Act of Congress shall be exempt from taxation by States, Territories and municipal corporations, on account of the lien of the United States upon the same, for the costs of surveying, selecting and *conveying* the same, or because no patent has been issued therefor."

It was certainly the intention of Congress in passing that act to enable the Territories and States to tax these land grants. It certainly was the intention of Congress to shut every avenue of escape from taxation of these lands. It was within the power of Congress to permit the taxation of public lands if it saw fit, the same as it has been held to be within the power of State legislatures to permit the taxation of State lands.

State *v.* C. P. R. Co., 21 Nev., 247.

And it is the duty of courts to give full effect, according to its spirit and evident intent, to this Act of Congress passed in pursuance of the suggestion made by this Court in the case of N. P. *v.* Traill Co. (115 U. S., 600), which called attention to the manifest injustice of a state of things which permitted the railroad company to hold and enjoy for every purpose a large amount of lands, and at the same time escape the burdens of taxation, which alone made and constantly increased the value of their lands by the construction of roads and bridges, by the maintenance of schools and courts, by the enactment and enforcement of laws, and by the per-

formance of all those duties which taxation alone enables a State or municipality to perform.

The question has already been fully answered by this Court.

Maish *v.* Territory, Adv. Sheets L. Coop., Oct. Term, 1896, p. 207;
N. P. *v.* Patterson, 154 U. S., 130;
C. P. Ry. Co. *v.* Nevada, 162 U. S., 512;
N. P. *v.* Clark, 153 U. S., 252.

In the case last cited were similar allegations as to the mineral land question and as to the matter of prior claims and rights.

The case was certified to this Court by the same court which has certified the case at bar, and the same question, differently framed, was asked concerning the taxability of these lands. The allegations of the bill bearing upon the question now under consideration were substantially those of the case at bar, for it is alleged that—

> "The Secretary of the Interior and the President of the United States have refused to certify or patent said lands to your orator, or any part thereof, claiming and pretending that they are unable to ascertain or determine whether or not said lands are mineral in character. * * *
>
> "The United States and its officers have failed and refused to certify said lands so described in said schedules under said grant to your orator, or to certify any lands in the State of North Dakota to your orator, but have held and still hold the said lists suspended and unapproved for the reason that it is claimed that said lands may be mineral in character, and as such excepted from grant to your orator, or that said lands may not have been free from claims or rights at the date of said grant and of fixing the line of definite location opposite said lands; and the said question as

to whether the title to said lands passed to your orator under and by virtue of said acts and joint resolutions of Congress and the compliance therewith by your orator is now in controversy and pending before the Commissioner of the General Land Office and the Secretary of the Interior."

(Transcript in N. P. *v.* Clark (Case No. 15,429), pp. 3 and 4.)

Now, in the Clark case, this Court declined to answer the questions as to the taxability of these lands for the reason that—

"the pleader had not shown affirmatively that the company did not possess equitable title or ownership in the lands described and assessed." * * * "Nor do the averments negative the fact that the appellant was properly chargeable with taxes on the lands coming within the grant of July 2, 1864, and within the limits of the line of definite location of its road."

The foregoing is a deliberate, distinct and emphatic announcement by this Court that the allegations of the bill in the Clark case, above set out at length, fail to show that the lands are non-taxable.

The Supreme Court of North Dakota so understood it, for in the case of the Northern Pacific Railroad Company *v.* McGinnis, 61 Northwestern, 1032, they say that in the complaint in that case there is no allegation that the lands are mineral—

"Neither is there any averment that the land department claims that they may be mineral and is withholding patents on that account. This fact appeared in the complaint in the case of the Railroad Company *v.* Clark and yet, the Federal Supreme Court in that case, appears to have regarded the question now under discussion as so utterly untenable that it barely touches it in its opinion. *The question was necessarily decided, for had*

the contention of the plaintiff in that case been well-founded the court must have sustained its bill, and have enjoined the tax proceedings as they would have been utterly without foundation. This question is a Federal one and this authority is decisive on the point."

Now is the bill in the present case within the lines suggested by Justice Jackson in the Clark case? That is to say, does it show affirmatively that the company did not possess the equitable title or ownership in the lands described and assessed, and negative the fact that the company was properly chargeable with taxes on the lands coming within the grant of July 2, 1864?

Although the allegations of the Clark bill have been made more diffusive in the present bill, yet they are the same allegations in effect and amount only to saying that there is or was a controversy over the right of the company to the lands in question. In fact the present bill is much weaker as to the lands described in Schedule "B," for as to them it is admitted that the controversy is now ended and that the result of it shows that there were no facts to sustain the claim made adverse to the railroad company.

THIRD.

WAS IT THE PURPOSE OF CHAPTER 99, OF THE LAWS OF DAKOTA, FOR 1883, TO EXEMPT LANDS GRANTED TO AID IN THE CONSTRUCTION OF THE NORTHERN PACIFIC RAILROAD BY THE ACT OF JULY 2, 1864, WHICH ARE OUTSIDE OF ITS RIGHT OF WAY AND ARE NOT SHOWN TO BE USED IN ITS BUSINESS AS A COMMON CARRIER?

The law of Dakota referred to reads as follows:

"Section 1. In lieu of any and all other taxes upon any railroad except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this Territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this Territory, as hereinafter stated, that is to say:

"Every such railroad corporation or person operating a railroad in this Territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessments whatsoever, upon the property aforesaid. The said payments shall be made one-half (½) on or before the fifteenth day of February and one-half (½) on or before the fifteenth day of August in each year, and for the purpose of ascertaining the gross

earnings aforesaid, an accurate account of such gross earnings shall be kept by said company.

* * * "And for the purpose of securing to the Territory the payment of the aforesaid per centums it is hereby declared that the Territory shall have a lien upon the railroad of said company and upon all property, estate and effects of said company, whatsoever, personal, real or mixed, &c.

"Section 5. The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased or contracted to be sold or leased, &c.

"Section 6. The moneys received or collected by the territorial treasurer in pursuance of this act shall be disposed of by him as follows: One-third thereof shall be retained by him in the territorial treasury for the use of the Territory, and the remainder shall be apportioned among the several counties into or through which railroads respectively run, in proportion to the number of miles of main track situated in such counties respectively."

The territorial government held that such lands were not within the exemption granted by the law.

The interpretation placed on the act of 1883 by the executive department of that government will best appear by uoting from the Report of the Territorial Auditor for Term nding Nov. 30, 1888, page 210:

"A copy of the order to assessors of June 1, 1887, is given below, together with a brief statement of the action taken by this department relative thereto:

"You are hereby instructed to carefully assess for the purpose of taxation, all real estate, whether in acre property or in town lots or in blocks, belonging to railway companies in this Territory, excepting only from assessment such real estate as is in actual use for railway purposes. The legality of the gross earnings law is very questionable coming into direct conflict as it does

with section 1925 of the organic act. However this may be there is no question but what all property not actually used for railway purposes is subject to assessment the same as property of individuals."

The report continues:

"I believe that every company except the Northern Pacific now accept the above interpretation of the law and have paid the taxes so assessed in addition to the gross earnings tax, which is in lieu of a tax upon property used in the operation of the railroad."

The auditor says:

"A fair interpretation would seem to be that this law exempts only such land as is used or needed for railway purposes. This was undoubtedly the intention of the legislature of 1883, for at that time no other property was exempted by its provisions, as no railroad corporation within the Territory was authorized to own or hold real estate not used or needed for railroad purposes (the only exception to this was in the case of lands granted by the General Government). The lands of the Northern Pacific Railroad were at that time wholly exempt from taxation on account of a lien by the General Government for unpaid survey fees."

(N. P. R. Co. *v.* Rockne, 115 U. S., 600. This obstacle to taxation was removed by act of Congress, St. at L., Vol. 24, p. 143.)

The report adds (p. 213) that the Chicago and N. W. Railroad and all short lines in the Territory had paid taxes assessed against real estate not used for railroad purposes.

It is true that after the State of North Dakota was admitted to the Union two district judges of the State, sitting in the Supreme Court of the State to take the place of two Supreme Court judges who were disqualified, did announce

that the exemption granted by the law of 1883 extended to these granted lands. But the only member of the Supreme Court sitting in the case dissented (N. P. *v.* Barnes, 2 N. D., 310; S. C., 51 N. W., 386). The case was subsequently overruled, on another point it is true. (N. P. *v.* McGinnis, 4 N. D., 494; S. C., 61, N. W., 1032). And the same two district judges overruled themselves, without admitting the fact, in the case of Fargo & S. W. Ry. Co. *v.* Brewer (3 N. D., 34; S. C., 53 N. W., 177), where it is held that town lots not used for railroad purposes were not within the exemption.

And in the case of Grandin *v.* Le Bar (3 N. Dakota, 446), the Supreme Court of the State after showing that the decision in the case of N. P. Ry. Co. *v.* Barnes, on still another point, was erroneous, use the following language concerning the opinion in that case:

> "It is proper to add that two members of this court were not qualified to sit in Railroad Co. *v.* Barnes, and, under a constitutional provision, district judges were called in to sit with Chief Justice Corliss, who vigorously dissented from the opinion of the majority in that case; *and no judge of this court has* ever concurred in or approved the decision in that case."

Therefore there is no authoritative decision of Territorial or State courts that the law of 1883, if valid, exempts these lands, but the consensus of local interpretation is to the contrary.

A consideration of the statutes of Minnesota, from which the law of 1883 was adopted, will sustain our construction of that law.

The act of the Minnesota Legislature, approved May 22, 1857 (Session Laws 1857, page 3, special session), incorpo-

rated the M. & P. Ry. Co. Section 18 of that act provided:

> "The said company shall in each year pay into the treasury 3 per cent. of the gross earnings of the said railroad in lieu of all taxes and assessments whatever, and in consideration of such annual payments the said company shall be forever exempt from all assessments and taxes whatever * * * upon all the stock in the said M. & P. Ry. Co., whether belonging to said company or individuals, and upon all its franchises or estate, real, personal or mixed, held by said company, *and said land grant by said act of Congress hereby authorized to be conveyed to the said M. & P. R. R. Co. shall be exempt from all taxation* till sold and conveyed by said company."

It will be noticed that the Dakota law of 1883 omitted the important words which are italicized in the foregoing quotation. Omitting those words the Minnesota statute was substantially the same as the law of 1883 in question.

Turning now to the decisions of the Supreme Court of Minnesota, we find that the St. P. M. & M. Co. succeeded to the rights and immunities of the M. & P. Co., including the exemption from taxation granted by the act above quoted. In 1882 the former company purchased 35,000 acres of timber land, not used directly for railroad purposes, but only for getting ties.

In Todd County *v.* Ry Co., 38 Minn., 163 (S. C., 36 N. W., 109), the question of the taxability of these lands was raised. The Supreme Court of that State; held the lands taxable, and it follows from that case that if the charter of the road had not exempted the land grant in express terms it would not have been exempt under an act as comprehensive in its terms as the Dakota Statute.

In the case of State *v.* N. P. Co., 39 Minn., 25 (S. C., 38 N. W., 635), it was held that although the granted lands were specifically exempted, yet that timber grown on those lands became taxable as soon as severed from the soil.

In Ry. Co. *v.* City, 39 Minn., 112 (S. C., 38 N. W., 925), it was held that city lots purchased in view of probable development of business, but not presently used for railroad purposes, were not exempt.

See also—

County of Ramsey *v.* Ry. Co., 33 Minn., 537 (S. C., 24 N. W., 313).

Now, when Dakota adopted, as it did in 1883, the gross earnings law of Minnesota, but in doing so omitted the only words by virtue of which in Minnesota the granted lands had been held exempt, the only reasonable inference is that the legislature of Dakota did not intend to exempt such lands from taxation.

The language of Section 5 of the Act does not indicate an intention to exempt such lands.

The section reads as follows:

> "The lands of any railroad company shall become subject to taxation in the same manner as other similar property, as soon as the same are sold, leased, or contracted to be sold or leased." * * *

Under the rule of strict construction, as declared by this Court in cases hereinafter cited, it is clear that to say that after such a time lands shall be taxed, is not equivalent to saying that until such time they shall not be taxed. Unless the intention to exempt is found in other sections of the act it did not exist.

But, to arrive at the true force of section 5, the circum-

stances under which the act was passed must be considered and the source from which it was taken. At the time of its passage these lands were exempt and needed no exemption from the territorial legislature. They were exempt because the survey fees were unpaid.

Rockne *v.* N. P., 115 U. S., 600.

Section 5 was copied from the Minnesota law. In that State, as we have seen, certain railroad lands were exempted from taxation by the charters of the roads.

Parcher case, 14 Minn., 297.

Instead of operating as an exemption, section 5 and the same section in the Minnesota law were enacted for the opposite purpose of getting lands under taxation at the earliest possible moment. There was at least one railroad holding lands in Dakota which were exempt as long as they remained unsold (but became taxable as soon as sold), by virtue of a charter granted by the Territory of Minnesota before the Territory of Dakota was organized and while a part of the region afterward forming Dakota Territory was in the territory of Minnesota. And just before the act of 1883 was passed the Supreme Court of Dakota had held that the charter exemption granted by Minnesota could not be impaired by Dakota legislation (Winona & St. Peter R. R. Co. *v.* County of Deuel, 3 Dakota, Territorial, 1). So that there was the same reason for some such provision for reporting sales in Dakota as there was in Minnesota.

The differences in verbiage between the law of 1879 and the law of 1883 do not indicate a purpose to exempt the lands.

The law of 1879 (ch. 46, section 24) reads as follows:

> "Every railroad corporation organized under the provisions of this act, and every person or corporation

operating a railroad in this Territory, except railroads operated by horse power, shall on or before the tenth of February in each year make and return to the treasurer of this Territory, in such form and upon such blank as shall be furnished by him, a true statement of the gross earnings of their respective roads for the preceding calendar year; the number of miles operated by each such corporation or person and the gross earnings per mile during such year. Every such railroad corporation or person operating a railroad in this Territory shall pay to the said treasurer two per centum of the gross earnings of such railroad each year for the first five years after such railroad shall be or shall have been operated in whole or in part; and three per centum of the gross earnings of such railroad for each and every year after the expiration of said five years. One-half of such amount shall be paid at the time that the report to the treasurer of the Territory hereinbefore provided is made, and one-half on or before the tenth day of August in each year. * * * The percentage of gross earnings hereinbefore specified to be paid in pursuance of the provisions of this section shall be in lieu of all other taxation of the road bed, right of way, station or depot grounds, track, rolling stock, water stations, water tanks, turn tables, engine houses, machine shops, depots and necessary buildings, tools, machinery, material for repairs, gravel beds, furniture, telegraph instruments and lines, and fuel of such railroad corporation, used in or incident to the operation of such road. All property of railroads not above enumerated, subject to taxation, shall be treated in all respects, in regard to assessment and equalization, the same as similar property belonging to individuals, whether said lands are derived from the general government or from other sources." * * *

This law of 1879 was "An act to provide for the organization of railroad corporations, to regulate the operation thereof, and to provide for the taxation of their property."

Only two sections of the act, 24 and 25, refer to taxation. As a revenue law the act was meager and imperfect. For this reason it may be supposed the legislature passed the act of 1883, here in question. It is true that the description of property exempted is in the act of 1883 in more general terms, but it does not follow that any more property was exempted, for the act of 1879 was unnecessarily explicit. If it had declared that the gross earnings tax should be in lieu of all other taxes on the property of railroad companies, no other or different property would have been exempted than is described with much verbiage. The framers of the act of 1883 were doubtless familiar with the numerous decisions of courts construing exemption clauses in revenue laws, and drew the statute accordingly. The fact that no larger percentage of the gross earnings was required to be paid by the law of 1883 than by that of 1879 indicates that no greater exemption was intended under the later act.

It is true that appellant seeks to justify an opposite inference from a comparison of these statutes of 1879 and 1883; but while we may buttress our walls thus and build an argument, the appellant cannot. **An exemption cannot be based upon inferences nor drawn from comparisons.** It must be found so plainly written that it cannot be read out or construed away. An exemption from taxation must be so clearly stated that no argument will make the purpose of the legislator more manifest. That which needs argument to bring it within the exemption, must by that fact be judged non-exempt.

> "Legislation which, it is claimed, relieves any species of property from its due proportion of the general burdens of government should be so clear that there can be neither reasonable doubt nor controversy about its terms. The power to tax rests upon necessity and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment. If on any

fair construction of the legislation, there is a reasonable doubt whether the contract is made out, this doubt must be solved in favor of the State."

Justice Davis in Bailey *v.* Maguire, 22 Wall., 215.

"The existence of a well-founded doubt is equivalent to a denial of the claim."

Phoenix F. & M. Ins. Co. *v.* Tennessee, 161 U. S., 174;
C. B. & K. C. R. Co. *v.* Missouri, 120 U. S., 569;
Wilmington & W. R. Co. *v.* Alsbrook, 146 U. S., 279;
Tucker *v.* Ferguson, 22 Wall., 527;
Ford *v.* D. & P. L. Co., 164 U. S., 662.

The words "any other property" in the description of property exempted, must be held to include only property of the same general character as had been already specifically mentioned.

The only language in the act of 1883, which is claimed to expressly include these lands, is the phrase "any other property" in the first section, which reads as follows:

"In lieu of any and all other taxes upon any railroads * * * or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this territory belonging to the corporation owning or operating such railroads, or upon the capital stock or business transactions of such railroad company, there shall hereafter be paid," etc.

But the maxim, "*Clausula generalis de residuo non ea complectitur quae non ejusdem sint generis cum iis quae speciatim dicta fuerant*," is one of the most common and elementary of all rules for construing statutes. Language fully as broad has often and always been interpreted in accordance with our position.

In the recent case of Ford *v.* D. & T. L. Co. (164 U. S., 662), this Court applied the rule in a case very similar to the present; holding that an exemption of the "capital stock and all the property and effects of said company," did not include lands not directly used for the purposes for which the company was chartered, although acquired under express authority of the legislature granted subsequent to the grant of the charter.

In the case of State *v.* Comrs. (23 N. J. L., 510), it appeared that the charter of the railroad company provided that it should pay certain sums on persons and property transported, and "that no other tax or impost shall be levied upon the said company," and the question was whether certain houses and lots owned by the company and let by them to their workmen were taxable, the Court held them taxable.

33 N. J. L. 474

In the case of Cook *v.* State it appeared that by the charter of a railroad it was required to pay a percentage on its earnings, "and that no other tax or impost for the use of this State shall be levied or assessed on said company." It was authorized by its charter to hold at each terminus or station "lands not exceeding five acres and to build on them houses, warehouses and other buildings, &c., and to take the rents, profits and emoluments thereof." Under this charter the company purchased one acre of ground and rented a part of it out for a coal yard as it was authorized to do. The Court held this land taxable.

See, also, State *v.* Hancock, 23 N. J. L., 315.

In the case of State *v.* Flavell (24 N. J. L., 370) it appeared that by the charter of the company "all the lands, tenements, hereditaments, goods and chattels to the said society belonging shall be exempt from all taxes."

The question was whether or not certain mountain land, town lots and farm lands, which were not used in the prosecution of the corporate business, were taxable; and the court held that they were. In the case of State *v.* Fuller (40 N. J. L., 328), it appeared that the State law of railroad taxation provided that upon all land used or owned for the purposes of their road, *or otherwise*, the companies should pay a certain percentage, and the question was whether certain land owned by a railroad, but not used for the purposes of the road as a carrier, were taxable under the general law or under the law of railroad taxation, and the Court held the lands taxable in the same way as if not owned by a railroad company.

See, also, Bank *v.* State, 104 U. S., 493; Fargo & S. W. Ry. Co. *v.* Brewer, 3 N. D., 34, where the words "other property" in the act here in question were held not to include town lots.

The exemption being in consideration of payment of a percentage of earnings, it is reasonable to suppose that the exemption included only property used to produce the earnings.

Such was the view taken by the courts of Minnesota of the statute which was the original of the one here in question. (Only, in the Minnesota law, the granted lands were specifically enumerated among the things exempted.)

> "In view of what we think is the purpose of the law, that all property shall contribute to the common burden of taxation; in view of what seems to us to be the obvious relation between the income which is charged with a percentage and the exemption which is declared,—it is considered that the apparent purposes of the law are accomplished by an exemption of such property as may be fairly said to be held and used presently for railroad purposes. * * * In brief, the

property of the corporation which is used for its purposes is exempt from ordinary taxation, because indirectly, through the method prescribed in the law, such property does yield to the State its proper tribute, and when not so used it is not exempt.

Ramsey Co. *v.* C. M. & St. P. Ry. Co., 33 Minn., 537;
Todd Co. *v.* St. P. M. & M. Ry. Co., 38 Minn., 163.

This ruling is based on the theory that the law is not one of exemption from taxation, but for commuting taxes, and only that property is not taxed by the ordinary method which is taxed by contributing to swell the earnings of which the State takes a portion. This is quite in accord with recent utterances of this Court.

In Bank of Commerce *v.* State of Tennessee (161 U. S., 134), it was held that a provision that "the bank should pay the State an annual tax of one-half of one per cent. on each share of capital stock, which should be in lieu of all other taxes," did not exempt the accumulated surplus from taxation.

Mr. Justice Peckham said:

"The exemption is not, in our judgment, greater in its scope than the subject of the tax."

See also Shelby Co. *v.* Bank, 161 U. S., 149;
Gardner *v.* State, 21 N. J. L., 557;
State *v.* Bank, 18 Southern Rep., 753 (Louisiana).

In Tucker *v.* Ferguson (22 Wall., 575), this Court, speaking of a gross earnings tax, said:

"That section imposes a tax with reference to the railroad itself. It has no relation to the lands owned by the company not used nor necessary in operating the road."

The provision of the law relating to the distribution of the gross earnings tax shows that it was not the intention to exempt the lands.

If the payment of the percentage of earnings had been intended to be in lieu of the land tax then a part at least of the payment should have been divided among the counties according to the value of granted lands unsold within such counties. It is a well-known fact that many of the counties of North Dakota contained large tracts of land owned by the Northern Pacific Railroad Company, but did not contain a mile of the line of the road of that company. Richland county in which the lands here in question are situated in one instance. Under the provisions of the law of 1883 Richland county received no part of the gross earnings tax paid by the Northern Pacific Railroad Company. This is the difference between the law of 1883 and the law of 1889, which was before this Court in the case of N. P. *v.* Clark (153 U. S., 252), and which was considered in the case of N. P. *v.* Walker (47 Fed., 681). In those cases the defendants had to admit that the legislature intended the exemption of the lands because the law of 1889 provided that a part of the proceeds of the tax should be divided among the counties according to the acreage of unsold granted lands.

The law of 1889 in that particular reads as follows:

> "Section 6. The moneys received and collected by the territorial treasurer in pursuance of this act shall be disposed of by him as follows: In case the railroad company paying such tax owns no land granted in aid of the construction of its railroad, one-third of the same shall be retained by the territorial treasurer for the use of the territory, and the remainder shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in propor-

tion to the number of miles of main track situated in such counties respectively. In case the railroad company paying such tax owns lands granted in aid of the construction of its railroad, then thirty per cent. of the tax paid by such company shall be retained in the territorial treasury for the use of the territory, and forty per cent. shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in proportion to the number of miles of main track situated in such counties respectively, and thirty per cent. shall be apportioned among the several counties in which lands forming a part of its land grant is situated, in proportion to the number of acres of surveyed and unsold lands in said counties."

FOURTH.

IF SUCH WAS THE PURPOSE OF THE ACT, WAS THE ACT VOID IN WHOLE OR IN PART AS TRANSGRESSING THE LIMITATIONS PLACED UPON THE POWER OF THE TERRITORIAL LEGISTURE?

That part of the law necessary to be read in considering this question has been already set out in this brief at page 15.

This Court will answer the question affirmatively because the State court has so answered it.

The Supreme Court of North Dakota has decided that if the law exempted these lands it was in so far void because in conflict with Revised Statutes of the United States, section 1925, which reads as follows:

> * * * "The legislative assemblies of Colorado, Dakota and Wyoming shall not pass any law impairing the rights of private property, nor make any discrimination in taxing different kinds of property; but all property subject to taxation shall be taxed in proportion to its value."
>
> N. P. Ry. Co. *v.* McGinnis, 4 N. D., 494.

It is true that one of the judges concurred in the decision solely on the ground that the question was federal and had been decided by the Circuit Court of the United States in the case of N. P. Ry. Co. *v.* Walker, 47 Fed., 681. But the other two judges while basing their decision on the same case of N. P. *v.* Walker, do not suggest that the authority conflicts with their own convictions.

The Supreme Court of the State having thus held in favor of our contention that the law was in conflict with an act of Congress, the question could not be brought on writ of

error to this court, as it might have been had the decision sustained the law. It would seem to follow therefore that such ruling of the State supreme court to the effect that a local act is invalid, should be followed by the federal courts.

> "Otherwise we should have the strange spectacle of two different tribunals having co-ordinate jurisdiction in the same State, differing as to the validity and existence of a statute of that State without any power to arbitrate between them. In speaking, however, of their jurisdiction as being co-ordinate, it is only meant that one has no power to enforce its decisions upon the other. As a matter of propriety and right the decision of the State courts is binding upon those of the United States."

South Ottawa *v.* Perkins, 4 Otto, 260;
Norton *v.* Shelby Co., 118 U. S., 425;
Elmendorf *v.* Taylor, 10 Wheat., 159;
Bank *v.* Buckingham's Exrs., 5 How., 317;
Tyler *v.* Cass Co., 142 U. S., 288.

And the same rule applies to the construction by a State court of the law of the Territory from which the State was organized.

Stutsman Co. *v.* Wallace, 142 U. S., 293.

The ruling of the Supreme Court of North Dakota that the law was invalid in so far as exempting the lands, is in accord with the opinion of the Attorney-General of the Territory of Dakota, rendered March 8, 1886.

(Pamphlet 8vo., pp. 39, published at Bismarck, D. T., 1888.)

The Attorney-General declared the law of 1883 unconstitutional because it conflicted with section 1925 of the Revised Statutes, already quoted, and with the Fourteenth Amendment to the Constitution of the United States.

Likewise, the executive department of the territorial government regarded the law of 1883 invalid, if construed as exempting these lands.

> "The legality of the gross earnings law is very questionable, coming into direct conflict, as it does, with section 1925 of the organic act. However this may be, there is no question but what all property not actually used for railway purposes is subject to assessment, the same as the property of individuals."
>
> (Territorial Auditor's Instructions to Assessors, June 1, 1887, quoted on p. 210 of Biennial Report of Auditor for period ending November 30, 1888.)

The auditor adds in his report that every company except the Northern Pacific accepted this interpretation of the law.

We contend, therefore, that the fourth question certified by the Circuit Court of Appeals is not open to argument in this Court.

But if it is, we can present the arguments here which led to the decisions against its validity..

The law of 1883, construed as exempting these lands, is in conflict with section 1925 of the Revised Statutes of the United States.

Section 1925 has been quoted at page 31 of this brief.

In the case of N. P. *v.* Walker, 47 Fed., 681, Judge Caldwell has so clearly stated the reasons for our position here that we quote his opinion:

> "The organic act provides that the legislative assembly of the Territory 'shall not pass any law impairing the rights of private property, nor make any discrimination in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value.' Land is made one of the subjects of taxation under the revenue laws of the Territory. Con-

ceding that under the organic act the legislature may select the subjects of taxation, and conceding that it may classify property for purposes of taxation, and that the different classes of property may be valued or taxed by different methods; assuming but not deciding, that it was competent for the legislature to provide for taxing railroads by a tax on their gross earnings—and the question remains whether the act we are considering is not in excess of the lawful exercise of any of these powers under the organic act. At the threshold of the discussion of this question it is essential to determine the character, condition and use of the property claimed to be exempt from taxation under the act. The property of this railroad company is not limited to its railroad. It still owns many thousands of acres of its land grant. 'Railroad property' and 'the property of a railroad company' are not equivalent terms. The term 'railroad property' is commonly understood to mean the property which is essential to a railroad company to enable it to discharge its functions and duties as a common carrier by rail. It includes the right of way, road-bed, tracks, bridges, stations, rolling stock and such like property. On the other hand lands owned and held for sale or other disposition for profit and in no way connected with the use or operation of the railroad, are not railroad property in the sense mentioned but are property of the railroad company independently of its functions and duties as a common carrier. The railroad company as owner of the railroad owes many duties to the public with reference to that property and its use. It must keep its road in operation, carry all freight and passengers offering, and must perform this service without partiality or discrimination, and for a reasonable compensation. It owes other duties to the public as owner of the railroad, which need not be enumerated. But as owner of these lands it owes no legal duty to the public in respect of them, except to pay the taxes on them. It may hold, lease or sell them; it may sell them for the highest price it can obtain, or may de-

cline to sell, lease or improve them on any terms. Its relation to these lands in the respects mentioned is the same that a natural person sustains to the lands he owns. So far as relates to its lands it is a landed proprietor, on the same footing with any other proprietor of lands. The money earned from the sale or lease of these lands, as well as the unearned increments accruing by reason of their continued holding and the improvement of the surrounding lands, does not enter into the gross earnings of the railroad company upon which the tax is levied. The earnings upon which the tax is assessed are by the the terms of the act restricted to 'the gross earnings arising from the operating of such railroad.' It will thus be seen that while the plaintiff's railroad is taxed on its gross earnings, the lands belonging to the company are not taxed at all. They are neither taxed upon their value nor the income derived from them. The plaintiff is not in the position of a company whose charter exempts its property from taxation It accepted a grant of taxable lands. In the matter of taxation there is no difference between the lands owned by this company and lands owned by any other corporation or by a natural person. Lands by whomsoever owned, are subject to taxation, and must be taxed by a uniform rule according to their value. This is the rule of the organic act and it must be observed. But it is said the legislature, in the exercise of its powers to select the subjects of taxation and classify property for taxation, 'may place railroads in a class by themselves and tax them and their property different from other persons; the only limitation being that all railroads in the same class must be taxed alike.' But as before stated, conceding that under the organic act railroads may be classed by themselves for the purposes of taxation, and taxed by a method applicable to them alone, still that classification and method of taxation must be restricted to what is railroad property. It cannot be extended to lands which have no relation to the railroad, its uses or operation. The franchises of railroad companies and their earnings and railroad

property, may well be classed by themselves for purposes of taxation, and taxed by a different method or rule from that applied to other property. This may be done because it is unlike other property. It is the difference in the character, condition and use of this kind of property from other property that justifies the difference in classification and the mode of taxation. Property of the same kind in the same condition and used for the same purpose, must be taxed by a uniform rule without regard to its ownership. The legislature having selected land as a subject of taxation, all lands under the same conditions are subject to be taxed. The law for the taxation of lands must operate equally and uniformly upon all lands the condition and use of which are similar. While property may be classified for the purposes of taxation, between the subjects of taxation in the same class there must be equality. Property of the same kind and in the same condition, and used for the same purpose, cannot be divided into different classes for purposes of taxation, and taxed by a different rule, because it belongs to different owners. But this is precisely what the act under consideration seeks to do. It exempts the lands of the company from taxation simply and solely because they belong to the company, and taxes all other land by a uniform rule according to their value. It was not competent for the legislature either under the organic act or the fourteenth amendment of the Constitution of the United States, to classify the lands in the territory for purposes of taxation, into lands owned by railroad companies and lands owned by all other persons, and declare that the former should not and the latter should be taxed. The prohibition in the organic act against making 'any discrimination in taxing different kinds of property' necessarily implies a prohibition against any discrimination in taxing the same kind of property. It establishes the just and reasonable rule, which has become fundamental in our American system of taxation, that the burdens of taxation shall fall equally upon all owners of the same kind of property. If the act in

question is valid, then the wholesome and just provisions of the organic act, intended to secure equality in the burdens of taxation and to prevent discrimination and oppression, are meaningless."

We admit that railroad property may be taxed in a special method and at a special rate. But by "railroad property" is meant property necessary in the usual daily conduct of business as a common carrier by rail.

Cook *v.* State, 33 N. J. L., 474.

"Railroad property" would include road bed, depots, cars, engines, but not coal mines, nor timber lands purchased by the company for getting out fuel or ties.

Todd Co. *v.* Ry. Co., 38 Minn., 163;
Ramsey Co. *v.* Ry. Co., 33 Minn., 537.

Nor town lots, nor houses rented to employees.

State *v.* Comrs., 23 N. J. L., 510.

Nor any land except what the company could have condemned; it being authorized to condemn all land required in the performance of its duties to the public.

State *v.* Hancock, 33 N. J. L., 315.

Nor would machine shops for manufacturing engines and cars be included.

R. R. Co. *v.* Berks, 6 Barr., 70.

Nor land bought in at execution sale on a judgment for unpaid freight.

Bank *v.* State., 104 U. S., 493.

The legislature of Iowa passed an act providing that every railroad company should be liable for all damage sustained by any person, including employees of the company, in consequence of the neglect of any of its agents, engineers or other employees. In McAnnich *v.* Ry. Co. (20 Iowa, 343),

the defendant contended that the act was unconstitutional because it imposed a liability on railroads but not on other common carriers. The Supreme Court held the law valid on the ground that the railroads were a class of corporations distinguished from other employers of labor by the extra hazardous nature of the employment. Now, the language of the act was broad enough to include any person employed by a railroad company, whether in cutting ties, running an engine, or repairing cars. But in the later case of Deppe *v.* R. R. Co. (36 Iowa, 52), the Court considers the question how far railroad companies are a class with respect to relations with employees, and lays down the very rule for which we are here contending. Judge Cole in that case said:

> "If the statute should be so construed as to apply to all persons in the employ of railroad corporations, without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply on the same terms to all in the same situation, and hence would be unconstitutional—manifestly so. To illustrate—suppose a railroad company employs several persons to cut the timber on its right of way, where it is about to extend its road, and the land-owner employs a like number, seven persons, to cut the timber on a strip of equal length alongside of such right of way. If one of each set of employees shall be injured by the negligence of a fellow-employee and the employee of the railroad company can under the statute maintain an action against his employer and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation."

A railroad company may own ten thousand sheep, which it may exchange for cars, but that does not make the sheep "railroad property," and it would not change the principle if it were true that the company had no other means of get-

ting the cars. But land, *as such*, outside the right of way, can no more be used in the business of a carrier by rail than can sheep. Land may be exchanged or sold, like the sheep, and "railroad property" thereby obtained, but neither lands nor sheep are "railroad property."

The appellants will doubtless urge here as they have previously, that these lands are "railroad property" in the strict sense of the term, because they are used in the business of the railroad. But the form of the question seems to exclude such argument. The fourth question, inserting what is, by reference to the preceding question included, reads as follows: "If the purpose of the act was to exempt lands lying outside the right of way and not shown to be used in the business of the company as a common carrier, was the act void, etc." To say, then, that the lands are used for railroad purposes is an evasion of the question, not an answer.

But, is it true that the lands have been devoted to any "railroad use"? Is there any provision in the grant requiring the company to use a dollar of the money received from the lands in the building or running of its road? Suppose that the company had sold the lands for twice the cost of the road, would not the surplus have gone into the pockets of the stockholders? And suppose that the next day the company had refused to operate the road, what could Congress have done, more than forfeit the charter? Or suppose the whole line had been built and equipped without selling or mortgaging the lands, could not the company thereafter have sold them and divided the purchase money? The grant was a gift, a bonus. The land could not be sold in advance of construction and that was the sole limitation.

But if, as appellant claims, the lands were devoted to a special purpose, what was it? The charter of the company is entitled, "An Act Granting Lands to Aid in the Con-

struction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound on the Pacific Coast by the Northern Route." Appellant contends that the lands being granted to aid in constructing a railroad and telegraph line became "railroad property." We could contend with equal reason that they became telegraph property; or, does the telegraph line become a railroad line when owned by a railroad company? When this grant was made the tide of war was at its flood. The unity of the country was imperiled from without and from within. The pioneers of the Pacific slope had founded in a region of marvelous wealth a civilization separated by desert, wilderness and mountains from the communities of the East. Rapid communication, electric intercourse, was needed to keep these distant members in touch. For the accomplishment of the ends which Congress had in view the telegraph was as important as the railroad and the lands are as truly telegraph as railroad lands.

But whether we call them railroad lands or telegraph lands, the naming of them does not segregate them from all other lands for purposes of taxation. Persons and things may be classified in many ways, as we take one criterion or another; according to their attitude toward certain theological dogmas; according to their ability or inability to read and write; according to the trades they follow. These lines of classification intersect at all angles. The State may classify men for various purposes; may say who shall serve as jurors, who be subject to military duty, who may vote, and who hold office. But every such classification must be upon a basis for which sound reasons can be given. Men cannot be classed for duty as soldiers according to their religious beliefs or political preferences. But men of less than a certain stature may be excused, as well as cripples, invalids, the aged or those engaged in certain avocations deemed of special importance to the State. Men may be classified for

jury duty, but not on any such absurd basis as length of beard, color of hair, political preferences. So classification of men and things for taxation must be based on differences in their relation to the State, when considered as subjects for enforced contribution to public funds. But these lands are not distinguished in any way from other lands save by ownership.

There is no difference between them and other lands in the use made of them.

In every State, and especially in the West, large areas are held for speculation, idle and unimproved. The northwest quarter of section—town—range—mentioned in the schedules is covered with grass just like the adjoining quarters owned by some grantee of the company; their owners taking no thought except to avoid the payment of taxes, while they securely wait till the labors and sacrifices of surrounding settlers, till the taxes paid by others to build roads, bridges, school and court houses, till civilization wrought out by others shall have greatly enhanced the value of their acres; then they will realize the unearned increment by selling at a high price to the very men who have made the lands valuable. In its use of the lands the appellant is no more restricted than is any other corporation organized to buy and sell real estate, no more than a bank taking lands on a mortgage. The railroad company has a perfect right to sell or not to sell, to mortgage or to sell to whom and at what price it will or can. The resolution of 1870 merely annexed a condition subsequent that limits the power of alienation but in no manner affects the nature of the estate conveyed. Because a man may hold an estate with a possible condition subsequent limiting the price at which he may sell, is the legislature thereby warranted in putting him in a class by himself for purposes of taxation? That fact makes no difference in the amount of tax which the land ought to pay.

But such considerations have at best no bearing in this case. The appellants continually assume that the act of the Territorial Legislature was enacted especially for the benefit of the Northern Pacific Railroad Company, and is in effect a special act relating to the company, so far as it refers to land grants. But the law is in its terms general and applies to all roads and to all land-grant roads whether then existing or thereafter to be incorporated; and if appellants' grant is circumscribed, or apparently so, by any peculiar conditions not common to every land grant, those peculiar conditions can avail nothing here as a basis of classification. Appellant must maintain that all lands granted to railroads are by that fact set apart from all other lands for purposes of taxation, or at least that that bare fact may be used by the legislature of a power which did not grant the charter of the roads as a basis of exemption from taxation.

> "Classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that a man beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis."
>
> Gulf C. & S. F. R. Co. *v.* Ellis, 165 U. S., 150.

It is claimed, however, that there are expressions in the opinion of this Court, written by Mr. Justice Jackson, in the case of N. P. *v.* Clark (153 U. S., 252), which sustain the Dakota gross earnings law of 1889, and therefore also the

law of 1883. In that case the question of the validity of the law of 1889 was asked but not answered. The Court answered another question, and said:

> "In the view we take of the case the answer to the last question will dispose of the suit and render it unnecessary to enter upon the consideration and determination of the other propositions of law on which instructions are asked."

In the light of this statement the remark later on in the opinion that—

> "Payment of the gross earnings tax imposed by the act of 1889 would have discharged all claims for taxes upon the company's lands for that year"—

must be taken as if there were added thereto, "provided the law was valid as contended by the railroad company." The Court, in the same case, say of the law of 1883:

> "It is not material to the present case to consider whether this act was constitutional or not."

The appellants will doubtless cite cases in which exemption of such lands made in the charter granting the lands has been held valid. But such cases, as Judge Caldwell states in the opinion above quoted, are not analogous to this one. Lands held by the sovereign are not taxable, and when he grants them he may probably, in consideration of the benefits to be gained by him from the grantee, continue the exemption from taxation for a definite or indefinite period. But this case is wholly different. The Territory of Dakota neither chartered the company nor granted these lands, the company was under no duty to the Territory on account of its land grant, its obligations on that behalf were to the United States. To the Territory it owed no other duties than the law imposes on any common carrier by rail.

The act of 1883 is void, in so far as it exempts the lands in question, because in conflict with the Fourteenth Amendment of the Constitution of the United States.

All that has been said of the bearing of section 1925 of the Revised Statutes on this question is applicable with reference to the Fourteenth Amendment.

Giozza *v.* Tiernan, 148 U. S., 657;
Home Ins. Co. *v.* N. Y., 134 U. S., 594.

The law of 1883, if so construed, is in conflict with the Fifth Amendment of the Constitution of the United States.

The Fourteenth Amendment applies in terms only to the States, not to Territories; the Fifth Amendment, however, as it applies to Congress, applies also to the legislatures of the Territories, to which Congress could not delegate powers which it did not itself possess.

The argument under this head would be the same as that already given.

The law of 1883, construed as exempting these lands in consideration of the payment of a percentage of gross earnings, is void as conflicting with the principle that taxation must be for purposes public and local to the taxing district.

The principle is too well established to admit of discussion. (Cooley on Taxation, page 104.)

Section six of the law of 1883 provides as follows:

> "The moneys received or collected by the territorial treasurer in pursuance of this act shall be disposed of by him as follows: One-third thereof shall be retained by him in the territorial treasury for the use of the Ter-

> ritory, and the remainder shall be apportioned among the several counties into or through which railroads respectively run, in proportion to the number of miles of main track situated in such counties respectively."

That is to say, Richland county and several other counties received not one cent of the moneys paid in by the Northern Pacific Railroad Company in consideration for the exemption of the lands in Richland county, because it happened that no part of the line of the Northern Pacific Railroad extended into those counties; but the counties through which the road was built received money whether any part of the lands therein situated, granted to the railroad company, remained unsold or not. In other words Richland county was taxed for the benefit of other counties and not for its own benefit. These lands in Richland county were taxed by a commutation, but not in any degree for the benefit of the taxing district in which they lay.

The law of 1883 is void because it imposes a charge on interstate commerce.

One of the "limitations placed upon the powers of the territorial legislature" is that it shall not attempt to regulate commerce between the States.

This power and duty committed to Congress cannot be delegated to the legislature of a Territory.

Stoutenburgh *v.* Hennick, 129 U. S., 141.

The law of 1883 required the railroads to pay a percentage of "all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated in this Territory." The law of Minnesota, which was the source of the law of Dakota, provided (ch 105, Laws of 1877, sec. 1):

> "Each railroad corporation owning or operating a railroad in this State shall on or before the first day of

> February in each year make to the State railroad commissioner a true and just return of the gross earnings of its road within this State for and during the year ending the last day of December next preceding."

Under this law of Minnesota nearly all the railroads of that State, including the Northern Pacific Railroad, have ever since 1877 (and many of them for a longer period) been paying a percentage on earnings, both local and interstate. In the year 1884 the railroads paid into the treasury of Minnesota about six hundred and sixty thousand dollars. The earnings on which percentage is to be paid are calculated according to the ratio between the number of miles which each consignment of freight and every passenger is carried in Minnesota and the whole number of miles which the freight or passenger is carried. In this way the earnings of the divisions of the road lying in Minnesota are estimated, derived from local and from interstate traffic, and on all of them a percentage is paid.

Under the law of 1883 every road in the Territory of Dakota adopted, without question, the same rule of measurement prevailing in Minnesota, reported the earnings every year, including the proper proportion of all earnings on shipments which began in, passed through, or ended in the Territory of Dakota. The same rule had been followed under the law of 1879, which has been already quoted in this brief (p. 21).

> "Previous to 1887 * * * the entire business of the road was considered when making up the statement of earnings for taxation under the gross earnings law of the territory."
>
> (Territorial Auditor's Report, Nov. 30, 1888, page 212.)

But in 1886 this Court, in the case of Fargo *v.* Michigan (121 U. S., 230) held, that States could not collect a tax on

earnings derived from interstate commerce. Thereupon the Northern Pacific Company sought to take advantage of that decision to escape from the larger part of the gross earnings tax and refused to pay a percentage on anything more than the earnings on business which both began and ended in Dakota Territory. Some personal property of the company was distrained for the unpaid part of the tax and thereupon the company brought suit.

N. P. Ry. Co. *v.* Raymond, 5 Dakota, 356.

It appears from the complaint in that case (abstract, page 7 and report of case), that the gross earnings of the company in 1886 were $2,654,756.31, of which $2,309,549.25 was earned by the main line and the rest by branch lines in Dakota. This sum of $2,654,756.31, is the proportion for Dakota of the entire gross earnings of the line in 1886, which amounted to more than twelve millions (R. R. Commissioner's Report, Dakota, 1888, page 87). Of course, no part of earnings which did not arise in, end in or pass through the Territory were included in the amount as reported above, and only a proportionate part of earnings arising from traffic which was not wholly within the Territory. But less than $400,000.00, or scarcely more than one-seventh of the entire Dakota earnings was earned on traffic which both began and ended in Dakota—that is, traffic lawfully taxable by the legislature of that Territory. On the fifth day of March, 1887, the railroad company paid the installment of its gross earnings then due, based on said sum of more than two and a half millions, as previously reported—namely, a tax of $38,095.61, thus admitting that the tax was on interstate as well as local earnings, for on local earnings it would have had to pay about six thousand dollars only. In its complaint in the case last cited the company did not aver that the law did not mean to impose a tax on interstate commerce, but did allege that its earnings on interstate com-

merce could not be taxed. The judgment of the trial court in the case last cited was, "that in so far as said act of the Territorial legislature assumes or pretends to impose a burden or tax on interstate commerce * * * the same is unconstitutional, null and void." (Abstract, page 15.) In the supreme court of the Territory, on appeal from this judgment (N. P. *v.* Raymond, 5 Dakota, page 356), that court said:

> "It is clear at the outset and conceded by the Attorney-General for the appellant that so much of the act approved March 9, 1883 * * * as provides for a tax or a payment of a per centum in lieu thereof upon the gross earnings of a railroad company operating in this Territory, received from business—the transportation of persons or property—not local, that is not originating and ending wholly within this Territory, but interstate, and therefore coming under the head of interstate commerce, is unconstitutional and void."

The opinion of the Attorney-General of the Territory on the same question is found on page 5 of his brief in the case just referred to:

> "The amount paid by plaintiff March 5th, 1887, was paid in satisfaction of the installment which became due February 15, 1887, and was the exact amount of such installment, as appeared by the voluntary statement made by the plaintiff. Up to and including that date, it had been the uniform practice and custom of plaintiff to pay a percentage upon all the gross earnings of the corporation within the Territory, whether local or otherwise; and such is the plain spirit and intent of the law."

Thus the entire judicial department of the territorial government construed the law as levying a tax on interstate commerce, as well as on local traffic; and we have seen from the auditor's report that the executive department con-

strued it the same way; and so had the railway companies themselves, all of them:

> "Prior to 1887 the various railway companies operating lines of railroad in this Territory, paid under the present law of taxing their gross earnings, not only on local business, but also on the through business in proportion to the number of miles in the Territory."
>
> (Biennial Report Territorial Treasurer, November 30, 1888, page 98.)

The Legislature of Dakota, at the first session after it was found that no percentage on interstate earnings could be exacted, repealed the gross earnings law of 1883. Chapter 105 of the laws of 1889 is the repealing statute. And a few weeks later enacted the gross earnings law of 1889 (ch. 107, laws of 1889), which contained the following provision:

> "Any railroad company may accept and become subject to the provisions of this act * * * provided that any railroad company which is in arrears in the payment of taxes assessed under chapter 99 of the laws of 1883 (the law here in question) shall within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said law of 1883, before they can avail themselves of the provisions of this act by accepting its terms, *including taxes on both territorial and interstate earnings.* * * * Any company which has not complied with the provisions of chapter 99 of the session laws of 1883 by paying all taxes claimed on gross earnings, both territorial and interstate, or by filing an account of gross earnings, both territorial and interstate, shall prepare and file such account in the manner therein provided and * * * pay * * * the entire amount of taxes heretofore claimed by the Territory on local and interstate earnings of such companies, but remaining unpaid * * * and shall pay at the time of rendering such account all amounts claimed by the territorial auditor as tax due on the

local and interstate earnings of the company for the current or any preceding year."

It is true that a statute capable of two constructions, one making it void and the other leaving it valid, will always be so construed as to be a valid law; but that rule has no application to the law of 1883, because, first, the law is susceptible of but one interpretation; and, second, at the time when the law was passed it was generally supposed that a State could tax earnings derived from interstate commerce; this belief was founded on a decision of this Court: State Tax on Gross Receipts, 15 Wall., 284.

Del. and H. Canal Co., 17 Atl., 175;
Fargo *v.* Auditor-General 24 N. W., 538;
Telegraph Co. *v.* Mayer, 28 Ohio St., 521;
Express Co. *v.* St. Joseph, 66 Mo., 675;
Dissenting Opinion of Judge Corliss in N. P. *v.* Barnes, 2 North Dakota, 310, where a full discussion of this question will be found.

There is, therefore, no reason for the Court to assume that the legislature did not intend to tax interstate earnings, for at the time of the passage of the law of 1883 it was generally conceded that the States could tax them.

It is true that after the law of 1883 had been repealed, the law of 1889 repealed and the State of North Dakota admitted to the Union, two district court judges sitting in the places of two members of the supreme court of that State passed on the territorial law of 1883, and held that it was not intended thereby to require the railroad companies to pay a percentage on interstate earnings.

N. P. *v.* Barnes, 2 N. D., 310.

But that decision was overruled (on another point it is true) in the case of N. P. *v.* McGinnis (4 N. D., 494), and the entire law of 1883 was declared invalid. Certainly this

Court cannot be controlled by the speculations of two *nisi prius* judges concerning the meaning of a law of that State after the supreme court of the same State have held the law itself void. And in discussing the third question the writer has shown that this decision of the two lower court judges was overruled on still another point and the three judges who have composed the Supreme Court of North Dakota ever since the admission of the State took occasion to announce that no one of them approved that decision.

This Court in N. P. *v.* Clark (153 U. S., 252), assumed without question that the act of 1883 required payment of a percentage of the interstate earnings. Justice Jackson in the opinion in that case said:

> "It is not material to the present case to consider whether this act was constitutional or not; it was repealed by the act of legislature approved January 29th, 1889. Now it is shown by the bill that at the time the act of 1883 was repealed the appellant was in default of the payment of the percentages due upon its gross earnings for the years 1886, 1887 and 1888."

But the only part of the tax as to which appellant was in default was the percentage on interstate earnings, the local earnings having been accounted for and the payments on them made at the dates specified in the law of 1883.

Since then, the act of 1883 imposed a tax on interstate as well as local earnings, and was invalid so far as the tax on interstate earnings is concerned, it follows that the whole law was void; and this from the application of either one of two propositions:

Proposition A.

"If the parts of a statute are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other as to warrant the belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not

have passed the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them."

Cooley on Con. Lim., pp. 216, 217, 4th Ed.;
Allen *v.* City, 103 U. S., 80;
Virginia Coupon Cases, 114 U. S., 270;
Warren *v.* Mayor, 2 Gray, 99.

The law of 1883 was a plan for taxing railroads; those parts of it providing for payment of a percentage on business were a compensation for the exemption granted. For it must be supposed that the legistature intended the railroad companies to pay their fair share of taxes; and the plan of taking part of the earnings was a substituted method of taxation. It is difficult to imagine a case where the parts of a statute could be more interdependent and mutually compensatory. As the law appeared to the minds of the legislature it was fair to the roads and fair to the territory; but when by the decision of the territorial supreme court in N. P. *v.* Raymond (5 Dakota 356), obtained at the suit of the railroad company itself, six-sevenths of the consideration for the exemption was lost to the territory, the law which the legislature had thought fair and just became most unfair and unjust, and the legislature did not let it remain on the statute books a day longer than the time necessary to repeal it. Certainly it cannot be supposed that the legislature which granted an exemption in consideration of the payment or one hundred thousand dollars yearly would have given the same exemption on payment of one-seventh of that sum.

Proposition B.

"A statute which is in part invalid must be held to be wholly invalid, unless the parts—that which is constitutional and that which is unconstitutional—are capable of separation, so that each may be read by itself."

Baldwin *v.* Franks, 120 U. S., 678;
U. S. *v.* Reese, 92 *id.*, 214;
Keokuk *v.* Keokuk, 95 *id.*, 80;

Trade Mark Cases, 100 *id.*, 82;
Virginia Coupon Cases, 114 *id.*, 270;
U. S. *v.* Harris, 106 *id.*, 629.

The statement is as nearly as possible in the language used by Chief Justice Waite in the case first above cited, in which will be found an elaborate review of the other cases cited above.

Now, nothing can be clearer than that, in the case at bar, it is impossible to cut out and separate the invalid part. In order to make the act valid it would be necessary not to strike out but to add words, so as to limit the payments required to a percentage of local earnings; for the same words describe those earnings which are taxable and those which are not. As this Court said in Baldwin *v.* Franks, *supra*: "The limitation which is sought must be made by construction, if at all; not by separation. This, it has often been decided, is not enough."

Therefore, this law was wholly void in 1888, when the taxes involved here were levied and became due and payable. Under the law of Dakota Territory lands were assessed for taxes as of the first of April; the taxes were levied in August and became payable in November. The lands, then, were not exempted when the taxes were assessed, levied and due. The valid taxes so levied and due were never abated or vacated by any act of the legislature, or of any other body. And as if to close all questions about it the legislature, as we have seen, in January, 1889, repealed whatever might be supposed to remain of the law of 1883. There was, it is true, another gross earnings law passed after the levy of these taxes—after they had become due and after the law of 1883 had been repealed. This second law was passed in March, 1889, and is chapter 107 of the laws of that year, but it contains not a syllable about the land taxes already levied and due for the year 1888; it relates no more

to the taxes on lands for the year 1888 than for the year 1878. Those parts of the law of 1889 having any bearing on this point read as follows (Laws of 1889, Ch. 107, Sec. 1):

"In lieu of any and all other taxes upon any railroads, except railroads operated by horse-power within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of such railroad company, there shall hereafter be paid into the treasury of this Territory an amount equal to a percentage of the gross earnings of the corporation owning or operating such railroad arising from the operation of such railroad as shall be situated within this Territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided. Every such railroad corporation or person owning or operating or that may hereafter own or operate any line of railroad in this Territory, which shall have accepted this act shall pay to said treasurer each year for the first five years after the approval of this act an amount equal to three per centum of such gross earnings and for and in each and every year after the expiration of such five years an amount equal to two per centum of said gross earnings, and the payment of such amount annually as aforesaid shall be and is in full of any and all taxation and assessment whatever upon the property aforesaid. Said payments shall be made except as hereinafter provided, one-half on or before the fifteenth day of February and one-half on or before the fifteenth day of August in each year," etc.

Section 2 provided a penalty for failure to make returns of earnings.

Section 3 provided penalty for failure to pay the percentages.

Section 4 provided for distraint on failure to pay percentages.

Section 5 provided that lands of the companies should

become subject to taxation as soon as sold, leased, contracted to be sold or leased.

Section 6 provided for apportionment of taxes among the counties, and has already been set out at page of this brief.

Section 7: "Any railroad company which, at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this Territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors attested by its secretary and filed with the secretary of the Territory, accept and become subject to the provisions of this act, and provided that any railroad company which is now in arrears in the payment of taxes assessed under Chapter 99 of the Laws of 1883, shall within thirty days after the passage of this act, pay into the Territorial treasury the full amount of the taxes and interest due under the assessments under said law of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both Territorial and interstate earnings. It is further expressly provided that any company failing strictly to comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and taxation of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the session laws of 1883 by paying all taxes claimed on gross earnings both Territorial and interstate, or by filing an account of gross earnings both Territorial and interstate, shall prepare and file such account in the manner therein provided within thirty days after the passage of this act, and pay one-half the entire amount due under the acceptance and agreement herein referred to for the current year, and also the entire amount of taxes heretofore claimed by the Territory on local and interstate earnings of such companies but remaining unpaid at the time of filing such account and within thirty days after the passage of this act, or the same shall not apply to such com-

pany or companies. The balance of said taxes due for the current year, shall be paid to the Territorial treasurer on or before the fifteenth day of August, 1889," etc.

Section 8 provided as to taxing roads not accepting the act.

Section 9 provided that the act should be subject to repeal or amendment.

Section 10 provided that the law should take effect at once.

If then the law of 1883 was void for interference with interstate commerce, these taxes were lawfully levied on the lands in 1888. For even if the company could have waived the constitutional provision by paying the percentages according to the invalid law, it had not done so, but had sought the shelter of that very constitutional provision.

Nor can the appellants claim that the unconstitutionality of the law of 1883 was waived by the Northern Pacific Railroad Company in making the payments as stated in the bill in this case, for it appears that those payments were made long after the taxes here involved were levied and due, long after the company itself had obtained from the courts of the Territory, a decision that, as to six-sevenths of the taxes imposed by the law of 1883 that law was void and after the law of 1883 had been repealed. And it plainly appears that those payments were made solely to obtain the benefits offered by the law of 1889, which was an offer or contract on the part of the Territory, not strictly a law; the companies were not compelled to accept it and can claim nothing by reason of acceptance save what is plainly granted by the act; and the act neither expressly nor impliedly abated the taxes theretofore in any year levied on the lands.

FIFTH.

CONCEDING THAT THE PURPOSE OF CHAPTER 99 OF THE LAWS OF 1883 WAS TO EXEMPT, AMONG OTHER THINGS, THE LAND GRANT OF THE NORTHERN PACIFIC RAILROAD COMPANY, AND THAT SAID LAW IS VALID, ARE THE PAYMENTS OF THE PERCENTAGE OF THE GROSS EARNINGS FOR THE YEAR 1888 ALLEGED IN THE BILL TO HA[illegible] BEEN MADE SUFFICIENT TO ENTITLE THE COMPLAINANT TO THE EQUITABLE RELIEF SOUGHT?

The writer concedes that the railroad company had promptly paid all percentages on *local or intrastate earnings* as the same became due under the law, up to the time when it was repealed, in January, 1889. And if the legislature meant to exempt these lands and had power to do so, and if by the law no tax or charge on interstate commerce was intended, then he concedes that the payments were sufficient.

But if it be determined, as we contend, that the law did require payment of a percentage of earnings from interstate traffic, and if it can possibly be held that such a law is valid, then we contend that the payments made were not sufficient for the purpose mentioned. And this for the reasons stated in the last part of the discussion of the Fourth question: The payments on interstate earnings were not made in pursuance of the law of 1883, nor in order to obtain the benefit of that law, but were made after that law had been repealed without a saving clause, so that the companies were released from every liability under that law, and were made solely to obtain the benefit of the new law of 1889. The company and its receivers ought not to be heard claiming any exemption under the law of 1883 by virtue of payments so made.

SIXTH.

CONCEDING THE LANDS IN CONTROVERSY TO HAVE BEEN SUBJECT TO TAXATION FOR THE YEAR 1888, WERE THE APPELLANTS BY REASON OF ANY OF THE ALLEGED IRREGULARITIES OR DEFECTS IN THE MODE OF ASSESSMENT, ENTITLED TO EQUITABLE RELIEF WITHOUT FIRST OFFERING TO PAY THE TAXES PROPERLY CHARGEABLE AGAINST SAID LANDS?

The inquiry is limited to the method of valuation.

The bill alleges numerous defects at all stages of the tax proceedings, but only those need be considered which affect the valuation of the property. By the very terms, also of the question, it is conceded that the property was assessed. Now there are allegations in the bill to the effect that there was no assessment whatever of the lands. (Transcript, folio 24.)

> "(2) The said township and county assessors did not list and assess in the year 1888 the lands described in said schedules 'A' and 'B' or any of said lands, and omitted from the township and county assessment-rolls for said year the descriptions of said lands, and the descriptions of said lands do not appear in said roll."

These allegations were denied (Transcript, folio 36), and the issue of fact was submitted to the Circuit Court on a stipulation setting out as exhibits copies of the assessment-rolls referred to. (Transcript, folio 37.) From the wording of the question and from the fact that the issue of assessment or no assessment was determined not on the allegations of the bill, but on evidence not before this Court, I am strengthened in the conclusion that the question is limited strictly to those allegations of the bill which relate to the mode of assessment. So, too, the following allegation, which, perhaps, amounted to a statement that no assessment was

made in the county in the year 1888 was denied, and the issue of fact was likewise submitted on stipulation of record evidence:

> "(1) That the several county and township assessors for said county of Richland did not during the year 1888 make out, and did not make out and deliver to the county clerk of said county of Richland any assessment roll or rolls prepared in substantially the form prescribed by section 1582 of the compiled Laws of Dakota for 1887."
>
> (Transcript, folio 24.)

For answer see Transcript, folio 36. For stipulation see Transcript, folio 37.

Likewise the following allegation was denied, and the issue of fact so made was submitted on stipulated evidence:

> "(6) The Board of County Commissioners of said County of Richland did not hold a session of two days, commencing on the first Monday of July, 1888, as a board of equalization for the purpose of equalizing and correcting the assessment roll for said County of Richland."
>
> (Transcript, folio 25.)

For answer see Transcript, folio 36, and for stipulation Transcript, folio 37, the second paragraph of the stipulation.

It is true that the State Court, in Powers *v.* Larrabee, 2 N.D. 141, held that if the board of equalization met neither on the first Monday of July nor on the day following, the tax proceedings were void; but the bill does not allege that the board met on neither of those days, it alleges only that the board did not meet on the first of the days.

The omission of certain property from taxation did not invalidate the assessment of other property.

The appellants claim that the failure to assess certain other taxable property renders void the taxes on these lands. (Transcript, folios 20, 21 and 20.)

This omitted property consists of railroad rights of way, with rolling stock and equipment generally. A large portion of the property so omitted was property owned by the Northern Pacific Company.

But it is settled in North Dakota that the omission of some property from taxation will not relieve other property of taxes levied on it.

Shattuck *v.* Smith, 69 N. W. Rep., 5.

And this Court will follow the local decisions in such matters.

Witherspoon *v.* Duncan, 4 Wall., 210;
Barden *v.* Improvement Co., 157 U. S., 327;
Lewis *v.* Monson, 151 U. S., 545.

The defects in the mode of assessment do not entitle appellants to equitable relief without an offer to pay.

There remain to be considered the following allegations, which were demurred to (Transcript, folio 31, at the end of the folio) for want of equity.

> "(3) The said township and county assessors did not make out and deliver to the county clerk of said county on or before the first Monday of July, 1888, or at all any assessment-roll containing a list of all the taxable lands in said county in numerical order, beginning with the lowest section in the lowest numbered township, in the lowest numbered range in said county, and ending in the highest numbered section, township and range; that immediately following the description of lands in township 131 north, of range 47 west, on said assessment-roll, is the description of certain lands in township 131 and 132 north of range 52 west; that

the description of the lands described in schedules 'A' and 'B' situated in ranges 48, 49, 50 and 51 is placed in said assessment-roll after the description of a portion of the lands contained in range 52 west.

"(4) That said lands described in said schedules 'A' and 'B' were not assessed to said Northern Pacific Railroad Company for said year 1888, although said township and county assessors well knew that except for the claims of the United States thereto said Northern Pacific Railroad Company was the sole claimant thereof.

"(5) That the assessment roll of said county of Richland for the year 1888 does not show the number of the school and road district in which said lands described in schedules 'A' and 'B,' or any of them, were situated."

(Transcript, folio 25.)

It will be seen that the appellants do not claim that the assessment was excessive or fraudulent. This Court has never permitted taxes to be evaded for mere errors of form.

State R. R. Tax Cases, 2 Otto, 575;
Bank *v.* Perea, 147 U. S., 87.

The appellants do not allege that they were in any way injured by the insertion at the wrong place in the roll of some part of the lands in range 52, and to grant relief without such allegations is wholly inconsistent with the decisions of this Court and with the rulings of other courts of equity when applied to for relief from taxes.

Mr. Black, in his work on Tax Titles, section 90, quotes approvingly from the Supreme Court of Massachusetts to the effect that many regulations are made by statute designed for the information of assessors and officers, intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which, in no respect affects the rights of tax-payers. This may be considered directory. Officers may be liable, perhaps, to

punishment for not observing them, but their observation is not a condition precedent to the validity of the tax. The statute directing that the lands shall be assessed in a certain order is of this nature, and that a variance from that order does not render void the tax. This may be inferred from the fact that the law provides that the township supervisors, sitting as a board of review, may add lands omitted by the assessors to the list.

> "The board of supervisors of each town * * * shall m * * * for the purpose of reviewing the assessm * * * and in case any property, real or perso al shall have been omitted by inadvertence or otherwise, it shall be the duty of said board to place the same upon the list with the true value thereof." * * *
>
> (Section 797, Compiled Laws of Dakota, 1887.)

And after the tax list is made up and in the hands of the county treasurer, any lands omitted by the assessor may even then be added to the list. (Compiled Laws, section 1608.)

> "When the treasurer after the tax list is committed to him shall ascertain that any land or other property is omitted he shall report the fact to the county clerk, who upon being satisfied thereof shall enter the same upon his assessment roll and assess the value, and the treasurer shall enter it upon the tax list and collect the tax as in other cases."
>
> (Compiled Laws of Dakota of 1887, section 1608.)

Now it is quite evident that these additions cannot ordinarily be made at the place in the assessment rolls where the assessor ought to have put them; they would almost necessarily be made at the end of the book, regardless of the situation of the lands in the county.

The bill is not sufficiently specific in its statement of facts

in subdivision 3 of paragraph 11 to require an answer. The bill does not say whether the assessment roll complained of was made by the county assessor or by one of the township assessors, or by more than one of the township assessors. Where a county was organized under the township system the assessment rolls were all made by the township assessors, and there was no such thing as a county assessment roll. It does not appear from the complaint that in any one of the assessment rolls of townships in which the lands here involved were situated any error in the arrangement of the lands was made.

The fourth specification of defects, quoted above, to the effect that the lands were not assessed to the railroad company, is sufficiently answered by the quotation of section 1641 of the Compiled Laws of Dakota of 1887:

> "The sale of lands, town or city lots or any other real property shall not be invalid on account of such real property having been listed, or charged on the duplicate in any other name than that of the rightful owner." * * *

As to the fifth specification of defects, failure to name road and school districts, it need only be said that the complaint fails to allege that any road or school districts existed in Richland county. Some counties of Dakota were in 1888 organized under what was called the township system, others were not. In counties organized under the township system there were no school districts or road districts.

Section 1243, Compiled Laws of Dakota, 1887, reads as follows:

> "At the annual meeting of the county commissioners * * * it shall be the duty of the board * * * to apportion their respective counties into one or more road districts, *where such county is not at present formed into townships.*" * * *

Compiled Laws of Dakota, 1887, Political Code, chapter 17, article 5, note by compilers:

> "There are two systems of school government in vogue in the Territory, one known as the school township system, and the other as the school district system. * * * All those counties having the school district system in force shall be governed by chapter, etc., * * * and * * * said chapter is hereby revived and made of full force and effect so far as it relates to counties excepted from the operation of the school township system."

The provision of law requiring the assessment rolls to show the number of the road and school district in which each piece of property was situate was part of the old code of 1877, when there was no township system. Of course, in counties where every township had it own separate assessment roll, the provision was obsolete. The bill does not indeed state that Richland county was organized under the township system, but it does not state the contrary, and from the mention of township assessment rolls it would seem that the county was so organized.

It is not alleged that by reason of any or all the irregularities or defects complained of the appellants have been required to bear more than their fair share of the public burden.

State Railroad Tax Cases, 2 Otto, 575;
Bank *v.* Perea, 147 U. S., 87.

EDGAR W. CAMP,
Solicitor for Respondents.

Dated Nov. 1, 1897.

McHENRY *v.* ALFORD.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 189. Argued December 2, 3, 1897. — Decided January 3, 1898.

The ruling in *United States* v. *Union Pacific Railroad*, 168 U. S. 505, that each question certified to this court from a Circuit Court of Appeals "had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case, and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions," is affirmed and followed; and, being applied to the questions certified in this case, makes it necessary for the court to decline to answer the first, the second and the sixth questions.

Chapter 99 of the Laws of the Territory of Dakota of 1883 provided for the taxation of the lands of the Northern Pacific Railroad Company granted to it by Congress, outside of its right of way and not used in its business, while owned by the company and not leased, through the payment of percentages on gross earnings as provided for therein; the plain meaning of that act being to render the railroad company and all its property, land grants as well as right of way, free from the payment of all taxes, excepting to the amount and in the manner described in the act.

That legislation was not in conflict with the provision in the act of March 2, 1861, c. 86, 12 Stat. 239, providing that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

It is not necessary to decide whether the act of 1883 conflicts with the Constitution in that it lays taxes upon earnings arising from transportation of persons and property between different States.

The objection that the act of 1883 violates the Fourteenth Amendment is untenable.

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The railroad company can avail itself of the payment of the taxes under the act of 1883 as a full payment of the taxes for the year 1888, and the court answers the fourth question in the negative.

The next and fifth question is answered in the affirmative. The payments made by the railroad company for the year 1888, as set forth in the bill, embraced the whole amount of taxes due from the defendant for that year (as well as others) under the act of 1883. Even if not paid at the exact time provided for in the statute, the failure to so pay might be waived by the public authorities, and as the moneys were in fact paid to and received by the officers of the Territory and went into its treasury, and never have been returned or tendered back, there was an effectual waiver of any objection which might possibly have been urged that the payment was not in time.

This case comes here on a certificate from the United States Circuit Court of Appeals for the Eighth Circuit, and that court certifies several questions concerning which it desires the instruction of this court for the proper decision of the cause. These questions are founded, among other papers, upon the bill of complaint which forms part of the record herein. It appears that the bill was filed by the complainants' predecessors (who were receivers of the property of the Northern Pacific Railroad Company) on the 22d day of March, 1894, in the district court of the fourth judicial district of North Dakota, sitting for the county of Richland in that State. It was filed, among other things, for the purpose of obtaining a decree adjudging that certain alleged and pretended and attempted assessments, under state authority, were null and void, and that all certificates and deeds executed by virtue of such assessments were void and constituted clouds upon the title to the lands described therein, and which were alleged to be owned by the corporation of which the plaintiffs were receivers. Some of the individual defendants named in the bill were alleged to have purchased, at a tax sale under the assessments, separate portions of the property of the company situated in Richland County, and to have received certificates or deeds from the county officials purporting to convey to each of them certain portions of such property. Upon a petition of one of the individual defendants named Sumner R. Clark, alleging diverse citizenship between the parties and the existence of a separate con-

troversy between the petitioner and the complainants, a removal of the cause to the United States Circuit Court for the District of North Dakota was prayed for, and on the 5th of September, 1894, the court granted the petition and made an order for the removal of the cause. Upon a trial of the issues joined in the case, the Circuit Court of the United States for the District of North Dakota dismissed the complainants' bill, and the complainants thereupon appealed to the United States Circuit Court of Appeals for the Eighth Circuit.

It appears from the complainants' bill, that the Northern Pacific Railroad Company was a corporation created and existing by virtue of an act of Congress, approved July 2, 1864, c. 217, 13 Stat. 365, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route." The third section of that act, for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific coast, granted to the railroad company, its successors and assigns, certain portions of the public lands, as mentioned in the section. Pursuant to the provisions of the act, and prior to the year 1888, the company had definitely fixed the line of its railroad, and prior to that year had constructed and put in operation a continuous line of railroad and telegraph, extending from the waters of Lake Superior westerly and through the Territory of North Dakota to the waters of Puget Sound; and prior to, and during the year 1888, many thousand acres of land in North Dakota were owned by the railroad company, under the land grant above mentioned, although patents for a portion of the same were not issued until June 24, 1893, and, for another portion, not until June 18, 1894. (No question is made by the complainants herein that the lands owned by the company were not taxable in 1888 on account of the fact that the company had not then received patents from the United States therefor.)

On the 31st of May, 1870, Congress adopted a resolution authorizing the company to issue bonds for the construction of its road, and to secure the same by mortgages on its prop-

erty of all kinds and description, real, personal and mixed, including its franchises as a corporation. Under that resolution the company executed, at different times, several mortgages to secure the payment of a hundred millions or more of bonds issued to aid in the construction of the road, and these mortgages covered all the property of the company, including the lands granted to it by the United States under the act of 1864.

In 1893 the company was insolvent and unable to meet the interest upon its bonds or to pay its other indebtedness, and in that year suits were duly commenced against it by creditors to recover the amount of its indebtedness, and also, by the trustee mortgagee, to foreclose the mortgages, in which suit receivers were appointed, and the complainants are their successors.

On March 9, 1883, the legislature of the Territory enacted a statute, entitled "An act to provide for the levy and collection of taxes upon railroad property of railroad companies in this Territory," Laws of 1883, c. 99, p. 211, the first and fifth sections of which are set forth in the margin.[1] This act was repealed by chapter 105 of the Laws of 1889.

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[1] ACT OF 1883.

SECTION 1. *Percentage of Gross Earnings to be Paid in Lieu of Other Taxes.* — In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this Territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this Territory, as hereinafter stated, that is to say: Every such railroad corporation or person operating a railroad in this Territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said payments shall be made one half (½) on or before the fifteenth day of February, and one half (½) on or before the

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Subsequently, and on the 7th day of March, 1889, the legislature of the Territory passed another act, entitled "An act for the levy and collection of taxes upon property of railroad companies in this Territory."

Section 7 of the act of 1889 is set forth in the margin.[1]

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fifteenth day of August, in each year, and for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company; an abstract whereof shall be furnished by said company to the treasurer of this Territory on or before the first (1st) day of February in each year; the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the governor of this Territory, or any other person appointed by law, to examine under oath the officers and employés of said company, or other persons, and if any person so examined by the governor or other authorized persons shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the Territory the payment of the aforesaid per centums, it is hereby declared that the Territory shall have a lien upon the railroad of said company and upon all property, estate and effects of said company whatsoever, personal, real or mixed. And the lien hereby secured to the Territory shall have and take precedence of all demands, decrees and judgments against said company.

SEC. 5. *Lands Subject to Taxation.*—The lands of any railroad company shall become subject to taxation in the same manner as other similar property, as soon as the same are sold, leased or contracted to be sold or leased; and on or before the first day of April of each year, each railroad company having lands within this Territory, shall return to the county clerk of each county, full and complete lists, verified by the affidavits of some officer of the company having knowledge of the facts, of all lands of such company situated in such county, sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A.D. 1883, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, or contracted to be sold or leased, prior to the last day of December, A.D. 1882.

[1] ACT OF 1889.

SEC. 7. *Any Railroad Company* which at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this Territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the secretary of the Territory, accept and become subject to the provisions of this act, and provided that any railroad company which is now

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The Northern Pacific Railroad Company, within thirty days after the passage of the act of 1889, duly accepted its provisions, and within thirty days from that date paid into the treasury of the Territory the entire amount of taxes and interest theretofore claimed by the Territory as due and remaining unpaid to it from the company on local and interstate earnings under the act of 1883, excepting that the second half of the sum due from the company to the Territory for the taxes of 1888, according to the provisions of the act of 1883, was not paid to and received by the treasurer of the Territory until August 15, 1889. The whole tax for 1888, under the act of 1883, amounted to nearly $100,000, while for all the years in which the company was in arrear under the act of 1883 (including the year 1888) the amount paid was nearly $200,000.

In the year 1888 the usual proceedings were taken by the officials of Richland County to assess all the property in the county under the general assessment laws of the Territory,

in arrears in the payment of taxes assessed under chapter 99 of the Laws of 1883, shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said law of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and in the manner provided for the assessment and the taxation of the property of individuals of this Territory, and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the Session Laws of 1883 by paying all taxes claimed on gross earnings, both territorial and interstate, or by filing an account of gross earnings, both territorial and interstate, shall prepare and file such account in the manner therein provided within thirty days from the passage hereof, and pay one half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the Territory on local and interstate earnings of such companies, but remaining unpaid at the time of filing said account, and within thirty days after the passage of this act, or the same shall not apply to such company or companies. The balance of said taxes due for the current year shall be paid to the territorial treasurer on or before the fifteenth day of August, 1889.

and in such assessment the land grant lands of the railroad company were included, (regardless of the act of 1883,) and thereafter in due course the taxes thus levied, not having been paid by the company, the treasurer of the county on the 4th day of November, 1889, attempted and pretended to sell many parcels of land belonging to the railroad company and being in the county already mentioned, for the purpose of collecting the taxes unpaid thereon, and no redemptions of the lands having been made, the county treasurer executed to the persons who purchased the lands or their assignees, some of whom are defendants in this suit, deeds purporting to convey the lands so sold to such persons, and these deeds are alleged to be invalid, but still a cloud upon the title of the company to the lands described therein.

The bill also sets forth a great many different alleged errors, irregularities and omissions on the part of the taxing authorities in taking proceedings to levy the taxes, by reason of which, as alleged, the taxation of the property of the company was illegal and the deeds were null and void.

A joint and several demurrer and answer to the bill was served upon the part of the defendants, taking issue upon some of the allegations of fact in the bill and demurring to other parts thereof, but a sufficient statement of the case has already been made to lead to a proper understanding of the questions hereinafter discussed.

Mr. C. W. Bunn for McHenry.

Mr. Edgar W. Camp for Alford.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

The learned Circuit Court of Appeals has certified to this court six questions, concerning which it desires the instruction of this court for a proper decision of the cause. The following are the questions so certified:

"1. Has the United States Circuit Court for the District of North Dakota jurisdiction to hear and decide said case?

"2. Were or were not the lands described in the bill of complaint subject to taxation under the laws of the Territory of Dakota in the year 1888 by reason of the facts stated in the bill of complaint respecting the condition of the title thereof?

"3. Was it the purpose of chapter 99 of the Laws of Dakota for 1883 to exempt from taxation lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way and are not shown to be used in its business as a common carrier?

"4. If such was the purpose of the act was the act void in whole or in part as transgressing the limitations placed upon the power of the territorial legislature?

"5. Conceding that the purpose of chapter 99 of the Laws of 1883 was to exempt, among other things, the land grant of the Northern Pacific Railroad Company, and that said law is valid, are the payments of the percentage of the gross earnings for the year 1888, alleged in the bill to have been made, sufficient to entitle the complainant to the equitable relief sought?

"6. Conceding the lands in controversy to have been subject to taxation for the year 1888, were the appellants, by reason of any of the alleged irregularities or defects in the mode of assessment, entitled to equitable relief without first offering to pay the taxes properly chargeable against said lands?"

Of these questions, we think we ought to answer only the third, fourth and fifth. The first, second and sixth come within our rulings in the cases of *Jewell* v. *Knight*, 123 U. S. 426; *Fire Insurance Association* v. *Wickham*, 128 U. S. 426; *Maynard* v. *Hecht*, 151 U. S. 324; *Graver* v. *Faurot*, 162 U. S. 435; *Cross* v. *Evans*, 167 U. S. 60, and *United States* v. *Union Pacific Railroad*, *ante*, 505.

In the case last cited, in speaking of the rules which govern the certification provided for in sections 5 and 6 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, the Chief Justice

repeated those rules as derived from prior decisions, and said that "each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case, and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions."

Guided by these rules, we find that the first question does not comply with their requirements. No single question of law is plainly raised therein. The record only shows that the case was commenced in a state court, and was removed upon the petition of one of the individual defendants into the Circuit Court of the United States for the District of North Dakota. Neither party (so far as appears from the record) raised any question of jurisdiction in the Circuit Court to hear and determine the whole case. Whether there is some defect supposed to exist in the petition for removal, or whether the controversy was or was not a separable one, or whether the citizenship of the different parties was not sufficiently alleged or did not sufficiently appear; whether the petition was filed in the proper time, or the bond was sufficient in form, or the approval of the court was or was not sufficient, all these questions are possible subjects of inquiry in order to answer the general question submitted to us. We should not be asked to grope our way through the papers submitted and examine every objection that imagination could raise, with no hint as to what, if any, objection is really supposed to exist. Some of the above enumerated possible objections could not in any event be answered in the present state of the record, which does not contain all the facts necessary to be known in their consideration. If the whole case were here upon writ of error or appeal, we should have to look into any question of jurisdiction, whether raised or not, but we are not obliged to do so when questions only are certified to us, unless presented in proper form.

The second question we regard as equally objectionable. The question certified is not a distinct point or proposition of law clearly stated so that it can be definitely answered without regard to other issues of law or fact in the case. What is the particular condition of the title to the lands which raises the doubt as to their being subject to taxation and induces the certification of the whole question to this court? This is not stated, and we are left to discover any or all possible objections by reading the bill and then conjecturing what the particular objection may really be.

What might otherwise have been considered as an objection, regard being had to the decision of this court in *North Pacific Railroad* v. *Traill County*, 115 U. S. 600, would seem to have been rendered of no force by the act of Congress of July 10, 1886, c. 764, 24 Stat. 143, providing for taxation of railroad grant lands. The question of law arising from the condition of the title is neither plainly stated nor is the condition itself clearly presented.

The sixth question, for the same reasons, cannot be answered. There is no plain statement of a distinct proposition of law. We are left to read the whole of that part of the bill alleging many different facts said to constitute various and separate irregularities, each of which might be a separate and distinct question of law, but all of which are joined together in an inseparable mass.

Questions of the character of the three thus described are not within the meaning of the act of 1891, and certifying them confers no jurisdiction upon this court to answer them.

We come then to the consideration of the third, fourth and fifth questions, and we will proceed to answer them.

The wording of the third question may at first sight render its meaning somewhat obscure. We are asked whether it was "the purpose of chapter 99 of the Laws of Dakota of 1883 to *exempt* from taxation lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way, and are not shown to be used in its business as a common carrier?" We

should answer — No, it was not the intention to exempt from but to change the mode of taxation.

This court, in *Northern Pacific Railroad* v. *Clark*, 153 U. S. 252, at page 271, in speaking of the act of 1889, which in this particular (that of substituting an assessment upon gross earnings) is similar in substance to the act of 1883, said that the act did not *exempt* the property of the railroad company from taxation, but that it merely substituted one method of taxation for another upon the terms and conditions specified.

But we take the true meaning of the question to be whether the act exempts from taxation the lands granted to aid in the construction of the railroad company in any other manner than as provided for in that act. Thus interpreting the meaning of the question, we are of opinion it should be answered in the affirmative.

The language of the act in its first section seems to be so plain as to be beyond the necessity of construction. The act says that the payments therein provided for are "in lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads, or upon the capital stock or business transactions of such railroad company." These payments are also said to be "in full of any and all other taxation and assessments whatever upon the property aforesaid."

In addition to this plain language, the act, for the purpose of securing the payment of the taxes as provided, gives to the Territory a lien upon the railroad of the company and upon all its property, estate and effects whatsoever, personal, real or mixed. This provision for a lien upon all property of the company, together with the provision of section 5, that "the lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased or contracted to be sold or leased," is additional proof to conclusively show that the lands while

owned by the company and not leased, etc., shall not be taxed other than as they are taxed by the act and through the payment of the percentages on the gross earnings, as provided for therein. The principle that exemption from taxation must be clearly shown, and that it generally applies (if at all) only to property used in the business of the company claiming the exemption, is acknowledged and assented to. The case of *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 662, is an illustration of the principle, but it does not here apply. The language of this act is clear and absolute. It is also not the case of an exemption from taxation but the substitution of one method for another. The land here in question is, in addition, closely connected with the business of the company. We shall show this more at length hereafter.

The learned counsel for the defendants argues that if the payment of the percentage of the earnings under this act was intended to be in lieu of the land tax, then a part at least of the payment would have been divided among the counties according to the value of the granted lands unsold within such counties, because, as he says, it is a well-known fact that many counties of North Dakota contain large tracts of land owned by this company but do not contain a mile of the line of its road, and under the provisions of this law a county thus situated received no part of the gross earnings tax. But this argument goes only to the alleged injustice of the appropriation of the tax when paid, and not to its extent or character.

Under the act of 1889 it is admitted that the legislature intended the exemption of lands like these in controversy from any taxation other than the indirect kind arising from the taxation of gross earnings, because under that act a part of the proceeds of the tax was divided among the counties according to the acreage of the unsold granted lands, even where no portion of the railroad was contained in such county. But the language of the exemption above described is substantially the same in both acts. The later act simply makes an appropriation of the proceeds of the tax somewhat different from that of the earlier one. The exemption was the same in each and founded upon the same language.

While the later act, perhaps recognizing the injustice in bestowing no portion of the tax collected upon those counties through which the road did not run, although lands of the company were therein situated, altered the disposition and appropriated a portion to the counties in which some of the lands were situated, yet no difference as to the intention of the legislature to exempt all the lands can be properly based upon this alteration. The exemption of the lands from a tax other than as therein provided for is based upon the same language in each act, and is perfectly plain in both.

It is also seen that by the act of 1879, c. 46, p. 122, Session Laws of Dakota, a system of taxation of certain specified property of railroad companies by a tax on their gross earnings was provided for, and the tax thus collected was stated in the act to be "in lieu of all other taxation . . . of the roadbed, right of way, stations or depot grounds, tracts, rolling stock, water stations," etc., "used in or incident to the operation of such railroad."

This act by reason of the tax on the gross earnings, limits the freedom from taxation, to the roadbed, as above stated, and property "used in or incident to the operation of such railroad." The act also provides that "all property of railroads not above enumerated, subject to taxation, shall be treated in all respect, in regard to assessment and equalization, the same as similar property belonging to individuals, whether said lands are derived from the general government or from other sources."

The difference between the language of the act of 1879 and that of 1883 is most marked. Instead of enumerating the particular property which is to be regarded as exempt from other taxation by reason of the tax on gross earnings, and providing for the taxation of the rest of the property of the railroad the same as similar property of the individual, as is the case in the act of 1879, the act of 1883 says the tax is in lieu of any and all other taxes upon any railroad within the Territory or upon the equipment or upon any other property situated in the Territory.

Does not this different language import, clearly and plainly, a different intention?

We are unable to think of any language of plainer meaning than that used in this statute, and there can be no doubt, as it seems to us, that its meaning is to render the railroad company and all its property, land grants as well as right of way, free from the payment of all taxes, excepting of the amount and in the manner described in the act.

This same question was argued in the Supreme Court of the State, and decided by it in 1892, in accordance with the views we have above expressed. *Northern Pacific Railroad* v. *Barnes*, 2 North Dakota, 310. It was afterwards decided in another way in *Railroad Co.* v. *McGinnis*, 4 North Dakota, 494, somewhat upon the theory that, as it was a Federal question, the court would follow the decision to that effect by a Federal court. 47 Fed. Rep. 681.

We are not embarrassed by these conflicting decisions, and we have no difficulty in answering the third question in the affirmative.

We come now to the fourth question which involves, among other things, the construction of one of the sections of the organic act creating the Territory of Dakota, (act of March 2, 1861, c. 86, 12 Stat. 239, at sec. 6, p. 241,) the material portion of which relating to the authority of the territorial legislature provides that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed." The same provision in substance is found in section 1925, Revised Statutes, relating to the legislative assemblies of Colorado, Dakota and Wyoming.

It is argued by counsel that, although under this provision of the organic law, the territorial legislature could generally select the subjects of taxation, and could classify property for that purpose, and that these different classes of property could be valued or taxed by different methods, nevertheless the act of 1883, under consideration, is in excess of the lawful exercise of any of the powers granted under the organic act,

notwithstanding that act in the section above alluded to provided that "the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act." There must be some solid ground for making a distinct classification of property, and such ground does not exist, as is contended, by reason of any of the facts herein mentioned.

Viewing the character, condition and use of these lands, it is said to be plain that they are simply "property owned by a railroad," and not "railroad property," as described in the title to the act of 1883, and that the two are not equivalent terms; that although railroad property might be taxed in a special method and at a special rate, yet by the term "railroad property" is simply meant property necessary for use in the usual daily conduct of the business of the company as a common carrier by rail, and that any lands outside of that use, although owned by a railroad company, could not be classified and taxed in any different manner from land owned by an individual, otherwise such classification would be purely arbitrary, and the taxation in that way would be illegal; that no earnings arise from these lands which are assessed under the act, because the earnings upon which the tax is assessed are by the terms of the act restricted to "the gross earnings . . . arising from the operating of such railroad," and such earnings are not created by nor do they arise from nor are they in any way connected with these lands, which are therefore not taxed at all under this act, and no justification for their special classification for purposes of taxation can on that account be found.

All these various statements are made in the course of the main and general argument that these lands cannot be taxed under an act like that of 1883, because there is no sound distinction between such lands owned by the company and ordinary lands owned absolutely by an individual.

We do not concur in the accuracy of the description as to the condition of these lands, and we are not, therefore, impressed with the force of the argument based upon it. The

lands are not purely and simply owned or held for sale or other disposition for profit, and in no way connected with the use or operation of the railroad, and in regard to them the company is not a landed proprietor, on the same footing with any other proprietor of lands, and it is not correct to say that these lands do not substantially, though indirectly, contribute towards the gross earnings of the railroad company, as provided in the act of 1883, nor can it be admitted that in merely taxing the gross earnings arising from the operation of the road these lands are not taxed at all. The lands are closely connected with the railroad and with its operation, and they are not in the same condition as a subject for taxation as are the lands of an individual. While we agree that property of the same kind and under the same condition and used for the same purpose cannot be divided into different classes for purposes of taxation and taxed by a different rule simply because it belongs to different owners, yet, where the situation and the possible use and the present condition of the ownership of lands are wholly different, such as they are in this case from ordinary ownership, a classification is not arbitrary nor unreasonable which places such lands outside the class of lands owned in the ordinary way by individuals.

Although the act here provides for the taxation of the gross earnings arising from the operation of the road, the phrase means earnings which arise because of its operation. The road is in operation, and the earnings which it is thereby enabled to make are to be taxed. Property which the company owns, and which has enabled and continues to enable it to operate its road, is part of the property from which the earnings arise by reason of such operation, and is within the meaning of the act. These lands are of this description. Although they are not taxed directly, yet the same is true of the right of way, the roadbed, the engines, cars and water tanks, all of which are confessedly "railroad property," without which the road could not be operated. In substance, it must be said that without the existence of all the various pieces of property just enumerated, gross earnings would be quite impossible. It is also true in regard to these lands. It

is not a question of what might under other circumstances have been their condition with relation to the railroad. We must take the circumstances that actually did exist at the time this act was passed for the purpose of determining this question. And, looking at those facts, we see that unquestionably these lands have indirectly contributed to the gross earnings derived from operating the road, and that such earnings have arisen and been made possible by reason of the lands. They have not only aided in making these gross earnings possible, but they have formed, and do still form, a material factor in the combination of circumstances contributing to the construction of the railroad, to its operation and to its earnings.

They originally formed a part of the public domain, and were granted by Congress for the purpose of aiding in the construction of this railroad to the Pacific coast, and were given to and accepted by the company, subject to the conditions named in the eighth section of the act. When the lands finally became the property of the company, they were impressed with a trust in favor of the Government, as representing the public, that they should be used for the purpose for which they were granted, and the company was not even allowed to mortgage or create any lien upon them in any way except by the consent of the Congress of the United States. Act of July 2, 1864, 13 Stat. 365, at page 370, section 10.

Subsequently it was found that the road could not be built under the conditions at first imposed, and Congress, therefore, in 1870, authorized the company to issue bonds for the construction of its road and to secure the same by mortgage. Under such authority, mortgages were thereafter made to secure bonds for more than a hundred million of dollars, the proceeds of which were used in building the road. These lands have, therefore, actually and directly contributed in a large measure and have formed a most potent factor towards building the road and enabling it to be operated and to earn moneys by reason of such operation. How can it be correctly said that they are not in any way taxed by a tax on the gross earnings of the road arising from its operation, when the road

could only be constructed and operated by reason (among others) of the moneys raised upon the security of these very lands? The present insolvency of the railroad company shows that the lands must form a most important item in the ability of the company or its successors to continue the operation of the road and make any earnings whatever.

If it be assumed that after the lands became the property of the company it was at that moment no more restricted in their sale than any other corporation organized to buy and sell real estate, and that it had the entire right to sell, or not to sell, or to mortgage to whom and at what price it might obtain, and that it owned the land like an individual, still the question is presented as to what was the actual condition of affairs when the act of 1883 was passed. At that time these lands were so closely connected with the railroad, its construction and operation, as in effect to be part and parcel thereof; they stood as security for millions of bonds issued to secure the construction and operation of the road, and upon these facts the reason and justification for a classification, such as was made in that act, are plainly apparent. At that time totally different circumstances than those which surround an individual in the absolute ownership of his property existed in relation to these lands. As they made the gross earnings possible, it cannot be said, with the least regard to the fact, that those earnings did not in part issue out of the lands upon the same principle that they partly issued out of the right of way, the roadbed, track, engines, cars, tanks and other confessedly "railroad property." There is no difference in principle between the two classes of property so far as this question is concerned. Then, too, the road of the company runs through the whole State, hundreds of miles; it owns thousands upon thousands of acres therein, granted it for the purposes stated, and these lands it has accordingly pledged to redeem its bonds issued as mentioned. Its building was a work of national importance, and it was built for use by the Government, as well as for other purposes. Surely all these various facts justify a classification of such an entity for taxation by a different method and upon different lines than the

individual, and lands thus situated and owned are in a materially different condition from lands absolutely owned by an individual.

It is said this reasoning, while it might be applicable to the Northern Pacific Railroad Company, would not be applicable to many other railroads which had no land grants, or which were not situated as is the company in question, and that as the law is in its terms general and applies to all roads, this company cannot obtain its benefit without showing that it is a valid provision in regard to all railroad property. But if the property of this company is so situated and the facts regarding it are so materially different from other real estate as to fulfil the conditions upon which a general classification may be proper, we think the company could avail itself of the act even if some other companies could not.

Many cases are cited, in the brief of counsel, from the different States having provisions in their constitutions somewhat similar to those found in the organic act of Dakota, and in which States it has been held that the legislature is not confined to taxation in precisely the same method for all classes of property, but that it has power to classify and to provide different methods of taxation of the property so classified. The particular facts arose in and the cases are cited from Wisconsin, Iowa, Kansas, Louisiana, Michigan, New Jersey, Pennsylvania, Mississippi, Missouri and Illinois. They are cited in the margin.[1]

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[1] *Wisconsin Central Railroad* v. *Taylor County*, 52 Wisconsin, 37; *Griswold College* v. *Iowa*, 46 Iowa, 275; *Missouri River &c. Railroad* v. *Morris*, 7 Kansas, 210; *Francis* v. *Atchison, Topeka &c. Railroad*, 19 Kansas, 303; *Louisiana State Lottery Company* v. *New Orleans*, 24 La. Ann. 86; *New Orleans* v. *Kaufman*, 29 La. Ann. 283; *New Orleans* v. *Davidson*, 30 La. Ann. 554; *New Orleans* v. *Fourchy*, 30 La. Ann. 910; *People* v. *The Auditor*, 7 Michigan, 84; *Youngblood* v. *Sexton*, 32 Michigan, 406; *State ex rel. Vail's Executors* v. *Runyon*, 41 N. J. Law, 98; *Kittanning Coal Company* v. *Commonwealth*, 79 Penn. St. 100; *Mississippi Mills* v. *Cook*, 56 Mississippi, 40; *Crow* v. *State*, 14 Missouri, 237; *Hamilton* v. *St. Louis County Court*, 15 Missouri, 3; *State* v. *North*, 27 Missouri, 464, 483; *Illinois Central Railroad* v. *McLean County*, 17 Illinois, 291; *State* v. *Crittenden County*, 19 Arkansas, 360; *St. Louis, Iron Mountain & Southern Railroad* v. *Berry*, 41 Arkansas, 509; *Arkansas Midland Railroad* v. *Berry*, 44 Arkansas, 17.

Upon a full consideration of the subject, we are persuaded that there is nothing in any provision of the act of 1883 for the taxation of the gross earnings which violates the letter or the spirit of the organic act.

Objection is also made to the act of 1883 on the ground that it is in violation of the commerce clause of the Federal Constitution in that by its terms taxes are laid upon earnings arising from the transportation of persons and property between different States, etc. In other words, that the tax is not confined to earnings which arise from the transaction of its business wholly within the State. It is said that the case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, holding that the imposition of taxes upon gross receipts of railway companies was not illegal, although the gross receipts were made up in part of freights received from the transportation of merchandise from one State to another or through one State into another, has been overruled by the subsequent cases in this court, among which are those of *Fargo* v. *Michigan*, 121 U. S. 230, 244; *Philadelphia & Southern Steamship Company* v. *Pennsylvania*, 122 U. S. 326; and it is claimed that the case is not brought under that of *Maine* v. *Grand Trunk Railway Company*, 142 U. S. 217, in that there is no provision for ascertaining the amount of gross earnings derived from interstate commerce and for the taxation of the balance only.

A perusal of the first section of the act does not render it at all clear that there was intended to be a tax of any portion of the gross earnings of the corporation which arose from interstate commerce. The language of the act which declares that the tax should be paid into the treasury of the Territory upon a percentage of all gross earnings of the corporation owning or operating such railroad "arising from the operation of such railroad as shall be situated within the Territory," gives great reason to doubt the correctness of the construction which would levy the tax upon the earnings derived from interstate commerce. But there is great force in the claim that the act is not subject to the objections mentioned in the above cases reported in 121 and 122 United States, and the cases

therein referred to. In those cases there was a distinct tax upon the gross earnings without reference to any other tax, and not in substitution or in lieu of another tax, while in this case the act plainly substitutes a different method of taxation upon the property of a railroad company. It is a tax upon the lands and all the other property of the company, but instead of placing a valuation upon the lands and other property, and apportioning a certain amount upon such valuation directly, as was the old method, a new one is established of taking a percentage upon the gross earnings as a fair substitute for the former taxes upon all the lands and property of the company, and when it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings.

We do not think it necessary, however, to decide this question, because we are of opinion that, by the act of 1889, the legislature proffered the company a compromise as to the taxes claimed to be due and the company accepted the same. Construing the act of 1883 as we do, and as meaning to exempt the company from the payment of all other taxes than those therein named, upon all its property of every name and nature, we find that in 1889 this company had been in default in the payment of its taxes under the act of 1883 for the years 1886, 1887 and 1888. It owed nearly two hundred thousand dollars in taxes for those years under that act. The taxing authorities of the county of Richland had also assumed to tax the lands of the company for the year 1888 in the same way as if owned by individuals, but the tax as thus assessed had not been paid by the company. In this state of affairs the act of 1889 was passed, the effect of which was to say to the company, if you will pay all the taxes that are due under the act of 1883, you may then accept and come in under

the provisions of this act. And there is in addition to this offer a clear and necessary implication from the language used in the act that if the company would pay those taxes in full which were thus in arrear such payment would operate as a discharge of all claims for taxes, including those claims made by virtue of the proceedings to tax the lands of the company under the general law. It certainly is not possible to believe that the legislature intended to make it a condition for the acceptance of the act of 1889 by the company that it should not only pay all the taxes which were provided for under the act of 1883, (and which by the terms of that act were in full of all other taxation,) and for the payment of which the company might be in default, and yet and in addition should still be liable to pay the taxes as assessed in Richland County under the general law. We cannot suppose the legislature intended to compel the payment of taxes twice, and therefore the language of the act of 1889 providing for the payment of all taxes in arrear under the act of 1883 as a condition for the acceptance of the act of 1889, implied that such payment should also be in full of all other claims for taxes assessed for the same years. Such a condition and proposition were entirely within the power of the legislature to impose and make, and when the proposition was accepted and the condition performed by the payment of money into the treasury of the Territory, all claim for taxes under any general law levied directly upon the lands necessarily fell with such payment and acceptance. This implied release of the taxes for the year 1888, which the authorities had assumed to levy under the general law and not under the provisions of the act of 1883, arises from the language of the act of 1889, and is just as strong and just as clear as if it had been stated in so many words in that act. That which arises by plain and clear implication from the language used in an act is as much a part of the act as if the implication had been embodied in so many words.

It may be said that the money should have been paid, if at all, within thirty days after the passage of the act. Possibly, if the payment had not been made within that time and the

company subsequently had offered to pay it, the money might have been refused by the authorities of the Territory, as not paid in time. But the question of the time of payment was one which might be waived by the public authorities, and the objection was in law and in fact waived by the receipt and retention of the money.

The other objection made to the act of 1883, that it violates the Fourteenth Amendment, we think untenable under the views we have above expressed.

Basing our opinion upon the facts of this case, we would say that for the reasons herein stated the company can avail itself of the payment of the taxes under the act of 1883 as a full payment of the taxes for the year 1888, and we formally answer the fourth question in the negative.

The next and fifth question we answer in the affirmative. The payments made by the railroad company for the year 1888, as set forth in the bill, embraced the whole amount of taxes due from the defendant for that year (as well as others) under the act of 1883. Even if not paid at the exact time provided for in the statute, the failure to so pay might, as we have already stated, be waived by the public authorities, and when the moneys were in fact paid to and received by the officers of the Territory and went into its treasury, and never have been returned or tendered back, we think there was an effectual waiver of any objection which might possibly have been urged that the payment was not in time.

To sum up, therefore, we do not answer the first, second and sixth questions. The answers to the third, fourth and fifth we make as above stated, and they will be

So certified.